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WISCONSIN REPORTS

120

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

DECEMBER 11, 1903 — MARCH 22, 1904.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER.

Attorney General, - L. M. STURDEVANT,

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 118.

Page 82, last line. For A. C. BRAZEE, read EMIL WALLBER.
" 180, line—7. For former, read latter.
" 549, line—5. For *J. A. Bennett*, read *J. Henry Bennett*.

VOL. 119.

Page 317, line 12. For *C. T. Wilcox*, read *R. P. Wilcox*.

TABLE

OF

CASES REPORTED.

Allard v. Smith 22

Appeals from justices' courts: Duty of appellant: Justices of the peace: Return on appeal, by whom made: Inherent powers of courts of record: Dismissal of appeal: Discretionary orders: Amendments.

Andresen v. Upham Mfg. Co. 561

Contracts: *Quantum valebat:* Pleadings: Sufficiency: Evidence: Delivery to third person: Findings: Costs:

Antigo, City of, Borgman v. 296

Antigo, City of, Dawley v. 302

Ashland, City of, v. Whitcomb 549

Federal courts: Jurisdiction of causes removed from state court: Powers and duties of state court.

Badger Telephone Co. v. Wolf River Telephone Co. 169

Trials: Election between counts: Immaterial error: Corporations: Sales: Telephone companies: Statute of frauds: Estoppel: Authority of officer.

Bain v. Northern Pacific R. Co. 412

Railroads: Negligence: Personal injuries: Cause of action, local or transitory? Dangerous place to work: Duty to warn: Court and jury: Fellow servants: Contributory negligence: Assumption of risk.

Baker v. The State 135

Criminal law and practice: Obtaining money under false pretenses: Charitable purpose: Information: Allegation of knowledge of falsity: Instructions to jury: Reasonable doubt:

"Orphans' asylum": Material misrepresentations: Evidence: Character of accused: Prior criminality: Intent to defraud: Similar misrepresentations: Remoteness: Husband and wife.

Bannerman, W. G. Taylor Co. v. 189
Barber Asphalt Paving Co., Beaser v. 599
Barron County, Ellis v. 390
Bashford, Chicago Title & Trust Co. v. 281
Beardsley v. Schmidt 405

Factors: Principal and agent: Sales by factor: Real party in interest: Trustee of express trust.

Beaser v. Barber Asphalt Paving Co. 599

Municipal corporations: Special assessments for street improvements: Validity: Equity: Remedies.

Borgman v. City of Antigo 296

Municipal corporations: Special assessments: Sprinkling streets: General city charter: Adoption.

Boyington Co. v. Southwick 184
Brown v. Gates 349

Bills and notes: Place of contract: Presumptions: Executory contracts made on Sunday.

Busse v. Rogers 443

Negligence: Personal injuries: Pleading: Evidence: Appeal: Affirmance and reversal: Children: Highways: Nuisances: "Attractive nuisances."

Carpenter v. Christianson 558

Pleading: Joinder of causes of action.

Caxton Co. v. School District Number Five 374

Schools and school districts: Officers: Purchases: Authority: Ratification.

Cezikolski v. Frydrychowicz 369

Tax titles: Constructive possession: Subsequent tax deed: Limitation of actions: Quieting title.

Chicago, Milwaukee & St. Paul R. Co., Ellis v. 645
Chicago & Northwestern R. Co., Euting v. 651

Chicago Title & Trust Co. v. Bashford 281

Constitutional law: Foreign corporations: Right to exercise franchises: Citizenship: Interstate comity: Construction of statutes: Vested rights: Failure to comply with statute: Transacting business: Transfer of title by operation of law: Commencement of action: Judgment creditors: Right of possession.

Chippewa Valley Electric R. Co., Wilson v 636
Christianson, Carpenter v 558
Conner Co. v. Goodwillie 603
Conroy, Lowe v 151
Cowley's Will, In re 263
Cupps v. The State 504

Criminal law and practice: Murder in the first degree: Intent: Presumptions: Evidence: Burden of proof: Motive: Character: Exceptions: Instructions to jury: Appeal and error: Prejudicial error: Questions reviewed: Verdict: Impeachment: Misconduct of jurors.

Davis v. Dregne 63

Master and servant: Personal injuries: Negligence: Improper remarks by court: Court and jury: Instructions to jury: Appeal and error: Exceptions: Material error.

Dawley v. City of Antigo 302
Decker, Roberts v 102
Dornbrook v. M. Rumely Co 36

Sales: Purchaser: Chattel mortgage: Filing: Priority: Fraudulent conveyances: Evidence: Collusion: Appeal: Harmless error: Questions reviewed.

Douglas Co. v. Sommer 424

County board: Power to adjourn annual meeting: Sheriffs: Compensation: Illegal allowance: Action to recover: Money had and received: Discount on county orders: Damages.

Dregne, Davis v 63
Drinkwine v. Gruelle 628

Witnesses: Adverse examination: Transactions with person since deceased: Competency: Deeds: Mortgages: Setting aside: Undue influence: Evidence.

Dr. Shoop Family Medicine Co. v. Schowalter 663

Appealable orders: Settlement pending suit: Jurisdiction: Judgment of dismissal: Costs.

Duffy v. Hinkley 492

Appeal and error: Trial by court: Findings, when disturbed.

Ellis v. Barron County 390

Appeal and error: Orders: Judgments: Limitation on time within which appeal can be taken: Practice: Aggrieved party: Dismissal of appeal: Discretionary orders: Review: Supreme court.

Ellis v. Chicago, Milwaukee & St. Paul R. Co 645

Railroads: Negligence: Injury to passenger alighting from train: Improper place to stop: Evidence: Setting aside verdict: Appeal: New trial.

Erickson, State ex rel. Sommer v. 435

Euting v. Chicago & Northwestern R. Co 651

(1) Decision on former appeal: Effect. (2–4) Railroads: Exploding torpedo on track: Injury to bystander: Liability: Damages.

Fey v. I. O. O. F. Mutual Life Ins. Society 358

Life insurance: Benefit societies: Contract limitations of actions: Waiver: Evidence: Estoppel: Agent: Service of summons: Proofs of death: Harmless error: Special verdict: Framing questions: Infancy of plaintiff: Failure to appoint guardian *ad litem*.

Fire Association of Philadelphia, Welch v 456

Flambeau Land Co., Mitchell Iron & Land Co. v 545

Fosha v. O'Donnell 336

Written instruments: Ambiguity: Parol evidence: Statute of frauds: Assumption of debt as part of consideration: Evidence: Immaterial error: Attorney and client: Conversations in absence of client: Accord and satisfaction: Authority to bind client: Ratification: Tender back of amount received: Instructions to jury: Judgment.

Franzini v. Layland 72

State boundaries: Mississippi river: "Main channel": Acts of Congress: Construction: Bayous: Acquiescence of sovereignties as evidence: Private parties: Riparian rights: Navigable waters: Title to unsurveyed islands: Presumptions: Mistake in public land surveys.

Frels v. Little Black Farmers' Mutual Ins. Co 590

Fire insurance: Assignment of policy after adjustment of loss: Rights of assignee: Garnishment: Failure of garnishee to disclose claims of third person: Contract limitation of actions: Waiver: Estoppel.

Frydrychowicz, Cezikolski v 369

Fuller & Johnson Mfg. Co., Mandt Wagon Co. v 258

Gall v. Gall 270

Appeal and error: Bill of exceptions: Certificate of trial judge: Impeachment: Presumptions: Contracts: Consideration: Demand: Commencement of action: Pleading: Amendment: Settlement: Refusal to submit question to jury.

Gates, Brown v 349

Germantown, Town of, Merkel v 494

Goldberg, Strasser v 621

Goodwillie, R. Connor Co. v 603

Graf v. Laev 177

Contracts: Architects: Instructions to jury: Mitigation of damages: Burden of proof: Tender of performance.

Graves, State ex rel. Hewitt v 607

Gross v. Heckert 314

Landlord and tenant: Absolute assignment of lease as security: Parol evidence: "Real party in interest:" Failure to deliver possession: Knowledge of lessee's intentions: Damages: Statute of frauds: Value: Sale as evidence: Advance payment to employee: Delay in making sale: Storage and care: Value of term.

Gruelle, Drinkwine v 628

Halvorsen v. Halvorsen 52

Equity: Cause of action: Vendor's lien: Consideration: Parol evidence.

Halvorson, Rhodes v 99
Hart v. Jos. Schlitz Brewing Co 553

Appeal and error: Respondent's exceptions, when available: Filing of records: Mortgages: Foreclosure: Judgment, when entered: Modification: Effect.

Heckert, Gross v 314
Hewitt, State ex rel., v. Graves 607
Hinkley, Duffy v 492
Humble, Lathrop v 331
Hunt, State ex rel., v. Stafford 203

In re Cowley's Will 263

Wills: Construction: "My lawful heirs": Appeal and error.

In re Mielke 501

Certiorari: Supreme court: Original jurisdiction: "Cannot be made elsewhere:" "Peculiar and satisfactory reasons."

I. O. O. F. Mutual Life Ins. Society, Fey v 358

Jensen, State ex rel., v. Yankee 573
Jones v. Thomas 274

Arbitration and award: Subject matter submitted: Construction: Equity: Inequitable use of judgments: Injunction.

Jos. Schlitz Brewing Co., Hart v 553

Kahle, Myrick v 57
Kaiser v. Nummerdor 234

Sales: Deceit: Fraudulent representations: Evidence: Special verdict: Instructions to jury.

Kavanaugh v. City of Wausau 611

Municipal corporations: Committee of common council: Duties: Meetings: Validity of committee's action: Direction of verdict: Presumptions: Rebuttal: Ratification: Contracts: Warranty: Evidence of breach: Remoteness: Instructions to jury: Prejudicial error.

Kelley, Maus & Co. v. La Crosse Carriage Co 84

Contracts: Breach: Measure of damages: "Lost use of factory:" Trial: Evidence: Pleading: Direction of verdict.

Kennedy v. Plank 197

Appeal and error: Bill of exceptions: Mistake in selling drugs: Damages: Evidence: New trial: Newly discovered evidence.

Klipp, Schroeder v 245

Klitzke v. Webb 254

Negligence: Personal injuries: *Res ipsa loquitur:* Presumptions: Rebuttal.

Kronshage v. Varrell 161

Wills: Bequest to charity: Class of beneficiaries: Charitable use.

Kurz v. Kurz 222

Equity: Quieting title: Evidence: Setting aside sheriff's sale on execution.

La Crosse Carriage Co., Kelley, Maus & Co. v. 84

Laev, Graf v. 177

Lathrop v. Humble 331

Sale of chattels: Varying written instrument by parol: Consideration: Appeal: Bill of exceptions: Certificate: Pleading: Practice.

Layland, Franzini v 72

Liegeois, Racine Wagon & Carriage Co. v 497

Little Black Farmers' Mutual Ins. Co., Frels v. 590

Longstaff v. The State 346

Habeas corpus: Jurisdiction of court commissioner: Review: Practice: Motion: Questions reviewed on *certiorari:* Writ of error.

Loose v. The State 115

Trial: Rules of court: Setting aside: Discretion: Appeal and error: Criminal law and practice: Remarks of court: Separation and exclusion of witnesses: Violation of order by witness: Exclusion of evidence: Contempt: Competency of witnesses: Age: Birth: Family records: Memoranda: Best evidence: Rape: Consent: Assault with intent to commit rape: Statutes: Instructions to jury.

Loper v. Estate of Sheldon 26

Contracts for services: Ambiguity: Statute of frauds: Void contract as evidence: Presumptions: Limitation of actions.

Lowe v. Conroy 151

Constitutional law: Police power: Health officers: Summary destruction of property: Liability: *Quasi*-judicial officers: Court and jury.

Malone v. Waukesha Electric Light Co 485

Location of electric light poles: Abutting owners: Costs: Appeal: Affirmance and reversal.

Mandt Wagon Co. v. Fuller & Johnson Mfg. Co 258

Contracts: Settlement: Release: Pleading: Demurrer.

Manitowoc Glue Co., Manitowoc Steam Boiler Works, v. 1

Manitowoc Steam Boiler Works v. Manitowoc Glue Co 1

Entire contracts: Exceptions: Measure of damages: Sales: Substantial performance: Acceptance: *Prima facie* evidence: Values: Pleading: Amendment to conform to proofs: Appeal and error: Reversal.

Manitowoc Steam Boiler Works, Seeger v 11

Manwaring, Welsh v 377

Maxcy v. McCord 571

Jurisdiction: Residence: Service of process outside of state: Effect: Judgment for costs: Construction.

McCarthy, Stein v 288

McCord, Maxcy v 571

Merkel v. Town of Germantown 494

Highways: Culverts: Diversion of service water: Authority of municipal officers.

Mielke, In re 501

Milwaukee, Light, Heat & Traction Co., Younkin v .. 477

Mitchell Iron & Land Co. v. Flambeau Land Co 545

Quieting title: Pleading: Sufficiency of allegation: Demurrer: Anticipated defenses.

Morgan v. Pleshek 306

Negligence: Personal injuries: Contributory negligence: Evidence: Conflicting inference: Question for jury.

M. Rumely Co., Dornbrook v 36

Mundt v. Shabow 303

Garnishment: "Debts due or to become due:" Building contracts: Liability of owner.

Murphy, Young v 49
Myrick v. Kahle 57

Deeds: Covenants of warranty: After acquired title of grantor: Tax titles: Posting notices of tax sale: "Public places": Affidavit of posting: Insufficiency: Amendment of affidavit: Evidence.

N. Boyington Co. v. Southwick 184

Taxation: Assessment to wrong person: Variance in descriptions: Mistake in name of plat: Mortgage interest: Material and immaterial defects: Limitation of actions.

Nemetz, Simanek v 42
Northern Pacific R. Co., Bain v 412
Northern Pacific R. Co., Schmitt v 397
Nummerdor, Kaiser v 234

O'Donnell, Fosha v 336

Pastorino, Zipp Mfg. Co. v 176
Plank, Kennedy v 197
Pleshek, Morgan v 306

Racine Wagon & Carriage Co. v. Liegeois 497

Contracts: Pleading: Actions: Misjoinder of causes of action.

Randles, City of Waukesha v 470
R. Connor Company v. Goodwillie 603

New trial: Discretionary orders: Costs: Appealable orders: Practice.

Rhodes v. Halvorson 99

Trespass: Unrecorded highway: Statutes: Evidence: Appeal and error: Harmless error.

Rickeman v. Williamsburg City Fire Insurance Co... 655

Fire insurance: Amount of loss: Evidence: Court and jury: View of premises: Removal of debris to destroy evidence: Taking memoranda to jury room: Fraud: Overstatement of loss: Evidence of financial condition.

Roberts v. Decker..... 102

Limitation of actions: Pleading: Definiteness: Inconsistent defenses: Recording act: Occupancy: Actual notice: Riparian rights: Milldam in stream: Deeds: Construction: Adverse possession: Cotenants.

Rogers, Busse v..... 443

Rumley Co., Dornbrook v..... 36

Ruscher v. City of Stanley..... 380

Municipal corporations: Sidewalks: Personal injuries: Negligence: Notice of injury: Sufficiency: Evidence: Contributory negligence: Appeal and error: Questions submitted in special verdict: Construction: Excessive damages.

St. Joseph Town of, Schrunk v..... 223

Schlitz Brewing Co., Hart v..... 553

Schmidt, Beardsley v..... 405

Schmitt v. Northern Pacific R. Co..... 397

Railroads: Appeal and error: Verdict: New trial: Request for a special verdict: Estoppel: Practice: Newly discovered evidence: Conduct of trial: Argument: Discretion.

School District Number Five, Caxton Co. v..... 374

Schowalter, Dr. Shoop Family Medicine Co. v..... 663

Schramek v. Shepeck..... 643

Guardian and ward: Care of incompetent by volunteer: Recovery.

Schroeder v. Klipp..... 245

Highways: Discontinuance: Lost record: Secondary evidence: Order of supervisors as evidence: Persons entitled to notice: Abutting occupants: Order: Validity: Stipulation in open court: Enforcement.

Schrunk v. Town of St. Joseph..... 223

Highways: Personal injuries: Negligence: Contributory negligence: Ordinary care: Special verdict: Questions submitted: Direction of verdict: Instructions to jury.

Seeger v. Manitowoc Steam Boiler Works 11

Contracts: Receipts: Parol evidence.

Seil, Taylor v 32
Shabow, Mundt v 303
Shawano County, Valentine-Clark Co. v 310
Sheldon, Estate of, Loper v 26
Shepeck, Schramek v 643
Shoop Family Medicine Co. v. Schowalter 663
Simanek v. Nemetz 42

Appeal from justices' courts: Trial *de novo:* Security for costs: Discretion: Deeds: Covenant of warranty: Breach: Landlord and tenant: Conversion of growing vegetables: Replevin: Parol evidence: Estoppel.

Smith, Allard v 22
Sommer, Douglas County v 424
Sommer, State ex rel. v. Erickson 435
Southwick, N. Boyington Co. v 184
Sprain, Swennes v 68
Stafford, State ex rel. Hunt v 203
Stanley, City of, Ruscher v 380
State, Baker v 135
State, Cupps v 504
State, Longstaff v 346
State, Loose v 115
State ex rel. Hewitt v. Graves 607

Certiorari: Proceedings to lay out highways: Jurisdiction: Failure to comply with statutes.

State ex rel. Hunt v. Stafford 203

Elections: Caucuses: Nomination by mass convention: Repeal of statute by implication: Constitutional law: Right of elector to have ballot counted.

State ex rel. Jensen v. Yankee 573

Towns: Vacation by county board: Statutes: Construction.

State ex rel. Sommer v. Erickson 435

Mandamus: Counties: Sheriffs: Compensation: Fees: Salary: statutes: Construction: Constitutional law.

State ex rel. Vandenhouten v. Vanhuse 15

Constitutional law: Local laws: Title of act: Legislative grant of corporate powers: Schools and school districts: Apportionment of school fund: Retrospective statutes: Necessary parties.

Stein v. McCarthy 288

Building contracts: Evidence: Intention of parties: Reference to specifications.

Strasser v. Goldberg 621

Replevin: Special verdict: Court and jury: Appeal: Affirmance and reversal: Evidence: Instructions to jury: Witnesses: Credibility: Damages.

Swennes v. Sprain 68

Pleading: Equity: Injunctions: Highways: Encroachments: *Res adjudicata:* Same cause of action: Estoppel: Justices' courts: Practice.

Taylor v. Seil 32

Negligence: Furnishing firearms to minor child: Liability of parent for negligence of child: Construction of statutes: "Pistol": "Revolver": "Toy firearm:" Appeal and error: Instructions to jury: Failure to request: Waiver.

Taylor Co. v. Bannerman 189

Thomas, Jones v 274

Upham Mfg. Co., Andreson v 561

Valentine-Clark Co. v. Shawano County 310

Taxation: Foreign corporations: Personal property: Situs for assessment: "Merchants' goods, wares, and commodities."

Vandenhouten, State ex rel., v. Vanhuse 15

Vanhuse, State ex rel., Vandenhouten v 15

Varrel, Kronshage v 161

Washburn, Town of, v. Washburn Waterworks Co 575

Appeal from justices' courts: Jurisdictional defects: Appeal and error: Record: Bill of exceptions: Waterworks: Franchise: Contracts: Construction: "Leasehold period:" "Franchise period:" "During such term:" "First ten years:" "Tax assessed:" Judgments: Taxation: Public service corporations: Personal property: Findings: Construction.

Washburn Waterworks Co., Washburn v 575
Waukesha, City of, v. Randles 470

Municipal corporations: Streets and sidewalks: Improvements: Abutting owners: Parties to proceedings: Statutes: Construction.

Waukesha Electric Light Co., Malone v 485
Wausau, City of, Kavanaugh v 611
Webb, Klitzke v 254
Welch v. Fire Association of Philadelphia 456

Fire insurance: General agent: Knowledge of agent: Standard policy law: Estoppel *in pais:* Waiver: Statutes: Proof of loss: Forfeiture.

Welsh v. Manwaring 377

Administration: Next of kin: Right of appointment: Mandatory statutes: Public administrator.

W. G. Taylor Co. v. Bannerman 189

Contracts: Mutuality: Exclusive agency: Breach: Damages.

Whitcomb, City of Ashland v 549
Williamsburg City Fire Insurance Co., Rickeman v 655
Wilson v. Chippewa Valley Electric R. Co 636

Interurban railroads: Negligence: Wanton and wilful injury at highway crossing: Court and jury: Evidence: Direction of verdict: Pleading: Cause of action.

Wolf River Telephone Co., Badger Telephone Co. v 169

Yankee, State ex rel. Jensen v 573
Young v. Murphy 49

Attorney and client: Purchase of client's property: Evidence: Burden of proof: Equity: Cancellation of instruments.

Younkin v. Milwaukee Light, Heat & Traction Co 477

Street railways: Operation of interurban cars on city street: Additional servitude: Eminent domain: Equity: Injunction.

Zipp Mfg. Co. v. Pastorino 176

Sale of chattels: Opportunity for test: Use of unnecessary quantity.

TABLE

OF

CASES CITED BY THE COURT.

Abbott v. Bradstreet, 8 Allen, 587 - - - - - - 265
Ackley v. Vilas, 79 W. 157 - 268
Adams v. Beloit, 105 W. 368 - 300
——— v. Filer, 7 W. 306 - - 596
Addy v. Janesville, 70 W. 401 475
Adkins v. Loucks, 107 W. 594 560
Ætna Ins. Co. v. Northwestern I. Co. 21 W. 458 - - - 344
Ainsworth v. Williams, 111 W. 17 - - - - - 351
Albiston's Est. In re, 117 W. 272 - - - - - 266, 268
Allard v. Smith, 97 W. 534 - 23, 24
Allen v. Allen, 114 W. 615 - 63
——— v. Chippewa Falls, 52 W. 430 - - - - - 229
——— v. Clausen, 114 W. 244 483
——— v. McKibbin, 5 Mich. 449 - - - - - - 6
Anderson v. Manchester F. Assur. Co. 59 Minn. 182 - 469
——— v. M. & St. P. Railway, 37 W. 321 - - - 417, 418
——— v. Sloane, 72 W. 566 - 329
Andrews v. Welch, 47 W. 132 557
Ashland v. Whitcomb, 114 W. 99 - - - - - '551, 666
Ashland L. Co. v. Detroit S. Co. 114 W. 66 - 284, 286, 603
Ashland L., S. & C. Co. v. Shores, 105 W. 128 - - 175

Backenstoss v. Stahler's Adm'rs. 33 Pa. St. 251 - 47
Baker v. McLeod's Estate, 79 W. 534 - - - - - 269
——— v. Scott, 4 Idaho, 596 220
——— v. State, 88 W. 156 - 66
Bank of River Falls v. German Am. Ins. Co. 72 W. 535 - 175
Barndt v. Frederick, 78 W. 1 - 239
Barney v. Keokuk, 94 U. S. 324 82
Barnum v. Fitzpatrick, 11 W. 81 - - - - - - 579
Bartlett v. Collins, 109 W. 477 - - - 352, 356, 418
Barton v. Bruley, 119 W. 326 35, 145, 150
Bassett v. Warner, 23 W. 673 560
Baumbach Co. v. Singer, 86 W. 329 - - - - - - 20
Becker v. Holm, 89 W. 86 - 201
Beers v. Kuehn, 84 W. 33 - 172
Beetle v. Anderson, 98 W. 5 - 240
Behl v. Schuette, 95 W. 441 - 396
Belton v. Baxter, 58 N. Y. 309 - - - - - - 411
Benedict v. State, 14 W. 423 522
Berg v. Milwaukee, 83 W. 599 423
Berger v. Berger, 104 W. 282 56, 57
Berry v. Snyder, 3 Bush, 293 82
Bertschy v. Bank of Sheboygan, 89 W. 473 - - - 320
Beyer v. St. Paul F. & M. Ins. Co., 112 W. 138 - - 308, 660
Bierbach v. Goodyear R. Co., 54 W. 208 - - - - - 329
Bigelow v. Goss, 5 W. 421 - 278
Binder v. McDonald, 106 W. 332 - - - - - - 396
Birdsey v. Butterfield, 34 W. 52 - - - - - - 240
Bishop v. Price, 24 W. 480 - 6
——— v. Young, 17 W. 46 - 305
Bittenhaus v. Johnston, 92 W. 588 - - - - - - 155
Black v. Winneshiek Ins. Co., 31 W. 74 - - - 362, 598
Blakeslee v. Rossman, 43 W. 116 - - - - - - 41
Blanchard's Lessee v. Porter, 11 Ohio, 138 - - - - 82
Blute v. Scribner, 23 W. 357 101
Bohn v. Racine, 119 W. 341 - 386

Bolin v. C., St. P., M. & O. R. Co., 108 W. 333 - - 640, 642
Boothby v. Scales, 27 W. 626 8
Borgman v. Antigo, 120 W. 296 - - - - - - 303
Bostwick v. Mut. L. Ins. Co. 116 W. 392 - 238, 240, 242, 468
——— v. Van Vleck, 106 W. 387 - - - - - - 557
Bourda v. Jones, 110 W. 56 - 122
Bourgeois v. N. W. Nat. Ins. Co. 86 W. 606 461, 463, 464, 466
Bowers v. Smith, 111 Mo. 56 - 220
Boyd v. Mut. F. Asso. 116 W. 155 - - - - - - 561
Boyington v. Sweeney, 77 W. 55 - - - - - - 323
Bozarth v. Dudley, 44 N. J. Law, 304 - - - - - 6, 8
Brader v. Brader, 110 W. 423 333, 340
Bragg v. Blewett, 99 W. 348 - 394
Breen v. Pangborn, 51 Mich. 29 - - - - - - - 379
Brinkman v. Jones, 44 W. 498 46, 320
Brown v. Gates, 120 W. 349 - 418
——— v. Lawrence, 3 Cush. 390 265
Buchan v. Nelson, 114 W. 234 396
Bulliner v. People, 95 Ill. 394 121
Burnham v. Burnham, 79 W. 557 - - - - - - 269
Burr v. German Ins. Co. 84 W. 76 - - - - - - - 465
Butler v. Butler, 46 W. 430 - 319
——— v. State, 102 W. 364 - 142
Buttenuth v. St. Louis B. Co. 123 Ill. 535 - - - - - 79
Buzby's Appeal, 61 Pa. St. 111 265
Byington v. Merrill, 112 W. 211 - - - - - 387, 389

Candee v. W. U. Tel. Co. 34 W. 471 - - - - - - 321
Carey v. German Am. Ins. Co. 84 W. 80 - - - - - 465
Carney v. Gleissner, 58 W. 674 149
Carroll v. C., B. & N. R. Co. 99 W. 399 - - - - - - 257
Carthaus v. State, 78 W. 560 - 529
Castenholz v. Heller, 82 W. 30 241
Cate v. Werder, 114 W. 122 - 188
Cathcart v. Comstock, 56 W. 590 - - - - - - - 19
Cawley v. La Crosse City R. Co. 101 W. 145 - - 238, 647, 649
Cernahan v. Chrisler, 107 W. 645 - - - - - - 668
Champion v. Crandon, 84 W. 405 - - - - - 496, 497
Chandos v. Mack, 77 W. 573 - 83
Chapman v. Plummer, 36 W. 262 - - - - - - 594
Charles Baumback Co. v. Singer, 86 W. 329 - - 20
Charter Oak L. Ins. Co. v. Sawyer, 44 W. 387 - - 284, 285
Chase v. Dodge, 111 W. 70 - 320
Chateaugay O. & I. Co. v. Blake, 144 U. S. 476 - - 296
Chicago & A. R. Co. v. Anderson, 166 Ill. 572 - - - 620
Chicago & N. W. R. Co. v. Forest Co. 95 W. 80 - - 583, 588
——— v. Milwaukee R. & K. E. R. Co. 95 W. 561 - - 483
Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977 - - 416
Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co. 113 W. 161 - - - - - - 268
Childs v. Russell, 11 Metc. 16 - 265
Chippewa Falls v. Hopkins, 109 W. 611 - - - - - 101
Citizens' L. & T. Co. v. Witte, 119 W. 517 - - - - - 557
Clauson v. C. & N. W. R. Co. 106 W. 308 - - - - - 497
Clawson v. Citizens' Mut. F. Ins. Co. 121 Mich. 591 - - 469
Claxton's Adm'r v. L. & B. S. R. Co. 13 Bush, 636 - - 641
Clifford v. State, 58 W. 477 542, 544
Clifton v. State, 73 Ala. 473 - 517
Clinton Bridge, 10 Wall. 454 - 21
Cobb v. Newcomb, 19 Pick. 336 - - - - - - 379
Cockburn v. Ashland L. Co., 54 W. 619 - - - - - 321
Coe v. Manseau, 62 W. 81 - 46
Cohn v. Plumer, 88 W. 662 - 5
Cole v. Kegler, 64 Iowa, 59 - 157
Coleman v. Scott, 27 Neb. 77 596
Collins v. Janesville, 111 W. 348 - - - - - - 654
Comm. v. Brown, 28 Kan. 83 429
——— v. De Voe, 159 Mass. 101 353
——— v. Drum, 59 Pa. St. 9 534–536
——— v. Knapp, 9 Pick. 496 121
——— v. Shepard, 1 Allen, 575 145
——— v. Stone, 4 Metc. 43 - 146
——— v. Whitcomb, 107 Mass. 486 - - - - - - 139
——— v. York, 9 Metc. 93 - 514
Comstock v. Scales, 7 W. 159 48
Conant v. Kimball's Estate, 95 W. 550 - - - - - 14
Conatty v. Milwaukee E. R. & L. Co., 100 W. 467 - - 200

Cone E. & C. Co. v. Poole, 41 S. C. 70 - - - - - 285
Considerant v. Brisbane, 22 N. Y. 394 - - - - 409, 410
Consolidated W. P. Co. v. Nash, 109 W. 497 - - - 175
Cooban v. Bryant, 86 W. 605 580
Cook v. Racine, 49 W. 243 - 601
Corwith v. State Bank of Illinois, 18 W. 560 - - - 395
Couldren v. Caughey, 29 W. 317 - - - - - - 395
Court of Honor of Illinois, In re, 109 W. 625 - - - 503
Cranson v. Goss, 107 Mass. 439 351, 353
Crate v. Petipher, 112 W. 252 579
Cream City G. Co. v. Friedlander, 84 W. 53 - - - 177
Crossett v. Janesville, 28 W. 420 - - - - - - 475
Crouse v. C. & N. W. R. Co. 104 W. 473 - - - - 653
Crowe v. Colbeth, 63 W. 643 56
Crumbly v. Bardon, 70 W. 385 548
Cubit v. O'Dett, 51 Mich. 347 159
Cuddy v. Foreman, 107 W. 519 - - - - 333, 340
Cullen v. Hanisch, 114 W. 24 45
Cummings v. National F. Co. 60 W. 603 - - - - 257
Cunningham v. Brown, 44 W. 72 - - - - - - 46
Cupps v. State, 129 W. 504 - 36
Curran v. A. H. Stange Co. 98 W. 598 - - - - 625
Curry v. C. & N. W. R. Co. 43 W. 665 - - - - 310
Cutler v. Ainsworth, 21 W. 381 - - - - - - 565

Danley v. Williams, 16 W. 581 182
Darry v. People, 10 N. Y. 120 - - - - - 538, 540
Davis v. Byrd, 94 Ind. 525 - 121
Davis L. Co. v. Hartford Ins. Co. 95 W. 226 - - - 460
Davison v. Brown, 93 W. 85 21
Day v. Buckingham, 87 W. 219 394
Deck v. Deck, 106 W. 470 633, 635
Decker v. Trilling, 24 W. 610 268
Delafield v. Smith, 101 W. 664 408
De la Vega v. Vianna, 1 Barn. & Ad. 284 - - - 417, 418
Denby v. Willer, 59 W. 241 - 453
Dennick v. Railroad, Co. 103 U. S. 11 - - - - - 416
Dermott v. Jones, 2 Wall. 1 6
De Witt v. Home Forum, 95 W. 305 - - - - - 461
Diana Shooting Club v. Lamoreux, 114 W. 44 - - 18
Dickerson v. State, 48 W. 288 - - - - 522, 523
Dickinson v. Edwards, 77 N. Y. 573 - - - - - 352
Dieckmann v. Sheboygan Co. 89 W. 570 - - - - - 302
Diefenback v. Stark, 56 W. 462 - - - - - - 5
Dingman v. State, 48 W. 485 522
Disch v. Timm, 101 W. 179 - 635
District of Columbia v. Gallaher, 124 U. S. 505 - - 280
Dobson v. Fussy, 7 Bing. 305 615
Dolph v. Clemens, 4 W. 181 - 278
Donge's Estate, In re, 103 W. 497 - - - - - - 164
Donough v. Dewey, 82 Mich. 309 - - - - - - 429
Dore v. Milwaukee, 42 W. 108 475
Dorer v. Hood, 113 W. 607 - 272
Dorothy v. Richmond, 107 W. 652 - - - - - - 44
Dowling v. Lancashire Ins. Co. 92 W. 63 - - - - 463
Downing v. Rugar, 21 Wend. 178 - - - - 615, 616
Druecker v. Salomon, 21 W. 621 - - - - - - 158
Drummond v. Eau Claire, 79 W. 97 - - - - - - 475
Dukes v. State, 14 Fla. 499 - 535, 538
Dunleith & D. B. Co. v. Dubuque Co. 55 Iowa, 558 - 79
Durkee v. Kenosha, 59 W. 123 - - - - - - 158

Eastwood v. La Crosse C. R. Co. 94 W. 163 - - - 639
Edgerton v. Michels, 66 W. 124 408, 410
Eingartner v. Illinois S. Co. 94 W. 70 - - - - 416, 418
Ellis v. Barron Co. 111 W. 576 392–394, 396
——— v. Cary, 74 W. 176 - 31
Emery v. State, 101 W. 627 - 142, 618
Erickson v. Peterson, 47 Minn. 525 - - - - - - 47
Erwin's Lessee v. Dundas 4 How. 591 - - - - 78
Evans v. Adams Ex. Co. 122 Ind. 362 - - - - 309
——— v. Rector, 107 W. 286 - 305
——— v. Rugee, 63 W. 31 - 606
Excelsior W. Co. v. Messinger, 116 W. 549 - - - - 192

Farr v. Peterson, 91 W. 182 - 238, 239, 242, 243
Fath v. Koeppel, 72 W. 289 - 151, 159, 160
Fatt v. Fatt, 78 W. 683 - - 395
Faust v. State, 45 W. 273 - 348
Fehrman v. Pine River, 118 W. 150 - - - - - - 388
Fertig v. State, 100 W. 301 522, 523
Finlay v. Prescott, 104 W. 614 393
Finney v. Ackerman, 21 W. 268 285
——— v. Guy, 111 W. 296 - 654
First Nat. Bank v. Chafee, 98 W. 42 - - - - - - 46
——— v. Damm, 63 W. 249 - 320
Fisher v. Otis, 3 Pin. 78 - - 356
Fitzgerald v. Berlin, 64 W. 203 - - - - - - 254
Fizell v. State, 25 W. 364 124, 125, 129
Flaherty v. Harrison, 98 W. 559 - - - - - 647, 649
Flatley v. Phenix Ins. Co. 95 W. 618 - - - - 469, 470
Floyd v. State, 59 Tenn. 342 - 535
Flynt v. Conrad, 93 Am. Dec. 588 - - - - - - 47
Folk v. Milwaukee, 108 W. 359 158
Fond du Lac W. Co. v. Fond du Lac, 82 W. 322 - - 585
Ford v. L. S. & M. R. Co. 124 N. Y. 493 - - - - - 420
Forward v. Continental Ins. Co. 142 N. Y. 382 - - - 469
Foster v. Singer, 69 W. 392 - 305
Fox v. Martin, 104 W. 581 - 635
——— v. Williams, 92 W. 320 666
Fox River F. & P. Co v. Kelley, 70 W. 287 - - 103, 112
Frankfort Bank v. Countryman, 11 W. 398 - - 565
Frederick v. Douglas Co. 96 W. 411 - - - - - 430
Fred Miller B. Co. v. Manasse, 99 W. 99 - - - - - 320
Frieberg v. Singer, 90 W. 608 21
Friend Bros. C. Co. v. Hulbert, 98 W. 183 - - - - - 345
Fuller v. Dauphin, 124 Ill. 542 83
Fuller-W. Co. v. Shurts, 95 W. 606 - - - - - - 5-8

Gallup v. Tracy, 25 Conn. 10 615, 616
Gans v. St. Paul F. & M. Ins. Co. 43 W. 108 - - - 598
Ganson v. Madigan, 15 W. 144 267
Gates v. Parmly, 93 W. 294 548
——— v. Raymond, 106 W. 657 345
——— v. Young, 82 W. 272 158
Gay v. D. M. Osborne Co. 102 W. 641 - - - - - 345
Geiser T. M. Co. v. Smith, 36 W. 295 - - - - - 668
Gibbons v. Grinsel, 79 W. 369 500
Gilchrist v. Brande, 58 W. 184 66
Gilman v. Brown, 115 W. 1 108
Gleason v. Waukesha Co, 103 W. 225 - - - - - - 602
Glocke v. Glocke, 113 W. 303 54
Goldsworthy v. Linden, 75 W. 25 - - - - - - 202
Goodland v. LeClair, 78 W. 176 - - - - - - 323
Goodwin v. State, 114 W. 318 149
Goss v. Agricultural Ins. Co. 92 W. 233 - - - 461, 463
Grace v. McArthur, 76 W. 641 - - - - - - 202
Graham & Co. v. Duckwall, 8 Bush, 12 - - - - - 408
Grannis v. Hooker, 29 W. 65 564
Green v. Batson, 71 W. 54 - 56
——— v. Miller, 6 Johns. 39 616
Greff v. Blake, 16 Iowa, 222 - 661
Griffin v. Colver, 16 N. Y. 489 90
Grindley v. Barker, 1 Bos. & Pull. 229 - - - - - 615
Grosvenor v. Hunt, 11 How. Pr. 355 - - - - - - 278
Groton v. Hurlburt, 22 Conn. 178 - - - - - - 616
Grunert v. Spalding, 104 W. 193 - - - - - - 70
Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 W. 214 - 90, 93, 94, 321, 329
Gutta Percha & R. Mfg. Co. v. Ashland, 100 W. 236 - - 393
Gwaltney v. Cannon, 31 Ind. 227 - - - - - - 645

Hacker v. Heiney, 111 W. 313 35, 344, 527
Hadley v. Baxendale, 9 Exch. 341 - - - - - - 90, 321
——— v. New Hampshire F. Ins. Co. 55 N. H. 110 - - 469
Hahn v. Doolittle, 18 W. 196 - 56
Hall, *In re*, 167 U. S. 38 - - 21
Hall v. Chippewa Falls, 47 W. 267 - - - - - - 475
Hamlin v. Spaulding, 27 W. 360 335
Hammer, *In re*, 113 W. 96 - 348
Hammer v. Schoenfelder, 47 W. 455 - - - - - 321
Hankins v. Rockford Ins. Co. 70 W. 1 - - - - - 465
Hanson v. Taylor, 23 W. 547 - 101
Harp v. Baraboo, 101 W. 368 - 497

Harpending v. Shoemaker, 37 Barb. 270 - - - - 564
Harrington v. Pier, 105 W. 485 168, 169
Harroun v. C. & W. M. R. Co. 68 Mich. 208 - - - 661
Hart v. Mayor, 9 Wend. 571 - 156
——— v. Red Cedar, 63 W. 634 - - - - - - 101
——— v. Smith, 44 W. 218 - 62
——— v. Stickney, 41 W. 630 122
Hartvig v. N. P. L. Co. 19 Oreg. 522 - - - - 420
Hayes v. Oshkosh, 33 W. 314 158
Hays v. G. St. R. Co. 70 Tex. 602 - - - - - - 641
Health Dept. v. Rector, 145 N. Y. 32 - - - 156, 157
Heard v. Fairbanks, 5 Met. 111 47
Hearshy v. Hichox, 12 Ark. 125 408
Heinemann v. Le Clair, 82 W. 185 - - - - - - 396
Helms v. Chadbourne, 45 W. 60 - - - - - - - 46
Hempton v. State, 111 W. 127 523, 532
Henckel v. Wheeler & W. Mfg. Co. 51 W. 363 - - - 580
Henley v. Wadsworth, 38 Cal. 356 - - - - - - 295
Herrick v. M. & St. L. R. Co. 31 Minn. 11 - - - - 416
Hersee v. Simpson, 154 N. Y. 496 - - - - - - 269
Hey v. Comm. 32 Grat. 946 - 121
Hibbard v. W. U. Tel. Co. 33 W. 558 - - - - - - 321
Higgins v. C. N. E. & W. R. Co. 155 Mass. 176 - - - - 416
Highland Ave. & B. R. Co. v. Winn, 93 Ala. 306 - - 641
Hildebrand v. Am. F. A. Co. 109 W. 171 - - - 5, 182
Hildman v. Phillips, 106 W. 611 625
Hill v. Comm. 2 Grat. 594 - 536
——— v. Sherwood, 3 W. 343 - 351
——— v. Spear, 50 N. H. 253 - 352
——— v. State, 17 W. 675 - 522
Hinckley v. Beckwith, 13 W. 31 - - - - - - 92, 93
Hixon v. Oneida Co. 82 W. 515 601
Hobkirk v. Phœnix Ins. Co. 102 W. 13 - - - 461, 463, 464
Hoffman v. C., M. & St. P. R. Co. 86 W. 471 - - - 606
Hogan v. La Crosse, 104 W. 107 - - - - - - 394
——— v. State, 36 W. 226 513, 533, 540, 542
Hoile v. Bailey, 58 W. 434 341
Holloway v. Holloway, 5 Ves. Jr. 399 - - - - - 265
Hopkins v. Rush River, 70 W. 10 - - - - - - - 229
Hosmer v. McDonald, 80 W. 54 - - - - - - - 280
Hoth v. Peters, 55 W. 405 229, 548
Houston v. State, 98 W. 481 159
Howell v. Comm. 26 Grat. 995 536
Hoyt v. Hudson, 41 W. 111 229
——— v. ———, 27 W. 656 497
Hubbell v. Goodrich, 37 W. 84 159
Humphrey v. Taylor, 45 W. 251 - - - - - - - 335
Hunt v. Stinson, 101 W. 556 30
Hurlbut v. Wilcox, 19 W. 419 502, 503
Hutton v. Camden, 39 N. J. Law, 122 - - - - - 157
Ide v. Insurance Co. 2 Biss. 333 - - - - - - - 598
Illinois C. R. Co. v. Illinois, 146 U. S. 387 - - - - 82
Illinois S. Co. v. Bilot, 109 W. 418 - - - - - - 82
Ilsley v. Merriam, 7 Cush. 242 411
Indiana v. Kentucky, 136 U. S. 479 - - - - - 77
Insurance Co. v. Wilkinson, 13 Wall. 222 - - - - 598
Iowa v. Illinois, 147 U. S. 1 - 80
Iverslie v. Spaulding, 32 W. 394 - - - - - - 63
Jackman's Will, *In re*, 26 W. 104 - - - - - - 633
Jackson v. Rankin, 67 W. 285 - - - - - - 250
Janesville Cotton Mills v. Ford, 82 W. 416 - - 280
Jarvis v. Barrett, 14 W. 591 572
Jemmison v. Gray, 29 Iowa, 537 - - - - - - - 121
Jenkins v. Bradley, 104 W. 540 - - - - - - - 561
J. I. Case Plow Works v. Niles & S. Co. 107 W. 9 - - 330
Jochem v. Dutcher, 104 W. 611 - - - - - - - 285
John O'Brien L. Co. v. Wilkinson, 117 W. 468 - - 334
John Pritzlaff H. Co. v. Berghoefer, 103 W. 359 - - 6
John R. Davis L. Co. v. Hartford F. Ins. Co. 95 W. 226 460
——— v. First Nat. Bank, 84 W. 1 - - - - - - - 596
Johnson v. Huber, 106 W. 282 277
——— v. Pugh, 110 W. 167 14, 30

Johnston v. Charles Abresch Co. 109 W. 182 - - - 433
Johnson v. N. W. Live Stock Ins. Co. 94 W. 117 - - 461
Jones v. Evans, 28 W. 168 - 201
——— v. Mayor, 90 N. Y. 387 594
——— v. Soulard, 24 How. 41 81
——— v. Williams, Amb. 651 169
Jorgenson v. Superior, 111 W. 561 - - - - - - 475
Jourdain v. Fox, 90 W. 99 - 320
Jung v. Stevens Point, 74 W. 547 - - - - - - 227

Kalk v. Fielding, 50 W. 339 - 662
Kane v. School Dist. 52 W. 502 376
Karber v. Nellis, 22 W. 215 - 527
Kavanaugh v. Wausau, 120 W. 611 - - - - - 622, 626
Keating v. D., B. C. & A. R. Co. 104 Mich. 418 - - - 641
Keeler v. Frost, 22 Barb. 400 - 616
Keenan v. Comm. 44 Pa. St. 55 534
Kellam v. Toms, 38 W. 592 - 548
Kellogg v. Costello, 98 W. 232 408, 410
Kelly v. Johnson, 5 Wash. 785 563
——— v. Kelly, 61 N. Y. 47 - 269
——— v. Rummerfield, 117 W. 620 - - - - - - - 46
——— v. Wright, 65 W. 236 - 342
Kempster v. Milwaukee, 103 421 - - - - - - 158
Kent v. Dunham, 142 Mass. 216 167
Keystone L. Co. v. Kolman, 103 W. 300 - - - - - - 268
Kidder v. Knights Templars & M. L. I. Co. 94 W. 538 - 598
Killips v. Putnam F. Ins. Co. 28 W. 472 - - - 362, 598
King v. Woodburne, 16 How. St. Tr. 54 - - - - - 515
Kirkeby v. Erickson (Minn.) 96 N. W. 705 - - - - - 48
Klix v. Nieman, 68 W. 271 - 452
Knapp v. Heller, 32 W. 467 - 601
Knight v. W. J. R. Co. 108 Pa. St. 250 - - - - - - 416
Koerts v. Grand Lodge, Hermann's Sons, 119 W. 520 - 469
Koester v. C. & N. W. R. Co. 106 W. 460 - - - - - 238
Krause v. Busacker, 105 W. 350 - - - - - - - 240
Krueger v. Wis. Tel. Co. 106 W. 96 - - - - - - - 483

La Crosse City R. Co. v. Higbee, 107 W. 389 - - - 482
Lain v. Shepardson, 23 W. 224 200
Lake Shore & M. S. R. Co. v. Murphy, 50 Ohio St. 135 - 420
Lamson v. Moffat, 61 W. 153 48, 320
Landauer v. Espenhain, 95 W. 169 - - - - - - 320
Lang v. Menasha P. Co. 119 W. 1 - - - - - - - 556
Lanphere v. State, 114 W. 193 123
Lanyon v. Woodward, 55 W. 652 - - - - - - - 48
Lavery v. Egan, 143 Mass. 389 265
Lawrence v. Barber, 116 W. 294 - - - - - - - 165
——— v. Janesville, 46 W. 364 - - - - - - - 548
Lawson v. Mowry, 52 W. 219 103, 112
Lawton v. Steele, 152 U. S. 133 155–157
——— v. ———, 119 N. Y. 226 155–157
Laycock v. Parker, 103 W. 161 6
Leonard v. Columbia S. N. Co. 84 N. Y. 48 - - - - - 416
Lessard v. N. P. R. Co. 81 W. 189 - - - - - - - 565
Lester v. Kinne, 37 Conn. 9 - 344
Level Land Co. v. Sivyer, 112 W. 442 - - - - - 560
Levine v. Barrett, 83 Minn. 145 - - - - - - - 395
Lewis v. Prien, 98 W. 87 - 308, 660
Lienan v. Lincoln, 2 Duer, 670 563
Limited I. Asso. v. Glendale I. Asso. 99 W. 54 - - - 433
Linden L. Co. v. Milwaukee E. R. & L. Co. 107 W. 493 - 483
Little v. Iron River, 102 W. 252 - - - - - - - 522
Livingston v. Greene, 52 N. Y. 118 - - - - - - - 269
Locke v. Williamson, 40 W. 377 - - - - - 238, 241
Loennecker's Will, 112 W. 461 635
Louisville, N. A. & C. R. Co. v. Bryan, 107 Ind. 51 - - 641
Lowe v. State, 118 W. 641 - 67
——— v. Stringham, 14 W. 222 - - - - - - - 579
Luddington v. Patton, 111 W. 208 - - - - - - - 345
Luebke v. C., M. & St. P. R. Co. 59 W. 127 - - - 421
Luther v. C. J. Luther Co. 118 W. 112 - - - - - 561

Maanum v. Madison, 104 W. 272 - - - - - - 310

Mabry v. Harp, 53 Kan. 398 47
MacCarthy v. Whitcomb, 110 W. 113 - - - 416, 418
Madison v. Am. San. Eng. Co. 118 W. 480 - - - - - 8
Maguire v. F. R. Co. 146 Mass. 379 - - - - - - 421
Malbon v. Birney, 11 W. 107 5, 7
Mallory v. Mariner, 15 W. 172 342
Mamlock v. Fairbanks, 46 W. 415 - - - - - - 238
Manufacturers' Bank v. Rugee, 59 W. 221 - - 320
Martin v. Estate of Martin, 108 W. 284 - - - 31, 32
——— v. Lemon, 26 Conn. 192 616
Marvin v. Anderson, 111 W. 392 - - - - - - 175
Mason v. Ashland, 98 W. 540 393
——— v. H. Whitbeck Co. 85 W. 164 - - - - - 175
Mathews v. Ripley, 101 W. 100 579
——— v. Capital F. Ins. Co. 115 W. 272 - - - 465, 466
Mauch v. Hartford, 112 W. 40 - - - - - 229, 588
Mayer v. People, 80 N. Y. 364 145
McAllister v. State, 112 W. 496 - - - 141, 142, 335
McCall Co. v. Icks, 107 W. 232 93, 192, 330
McCardle, *Ex parte*, 6 Wall. 318 - - - - - - 21
———, 7 Wall. 506 - - - 21
McCarthy v. C., R. I. & P. R. Co. 18 Kan. 46 - - - 417
McClellan v. C. V. E. R. Co. 110 W. 326 - - - - - - 642
——— v. Scott, 24 W. 81 - 240
McCobb v. Lindsay, 2 Cranch, C. C. 215 - - - - - 408
McCord v. High, 24 Iowa, 336 159
McCormick v. Herndon, 86 W. 449 - - - - - 55, 320
McCoy v. State, 25 Tex. 33 - 535
McCue v. Comm. 78 Pa. St. 185 535
McDaniel v. Allen, 64 Miss. 417 265
McDonald v. Bryant, 73 W. 20 8
——— v. Fire Asso. of Phila. 93 W. 348 - - - - - 463
McDonell v. Rifle Boom Co. 71 Mich. 61 - - - - - 620
McElroy v. Minn. P. H. Co. 109 W. 116 - - - - - - 607
McGillivray v. Joint School Dist. 112 W. 354 - - - 376
McGraft v. Rugee, 60 W. 406 408, 410
McGregor v. Pearson, 51 W. 122 - - - - - - 394
McKanna v. Merry, 61 Ill. 177 645
McKinnon v. Vollmar, 75 W. 82 - - - - - - 564, 565
McLain v. Comm. 99 Pa. St. 86 518
McLimans v. Lancaster, 57 W. 297 - - - - - - 606
McNamara v. Clintonville, 62 W. 207 - - - - - - 321
Meade v. Gilfoyle, 64 W. 18 - 188
Meehan v. Bloodgett, 86 W. 511 557
Meibus v. Dodge, 38 W. 300 - 454, 455
Meincke v. Falk, 55 W. 427 323, 324
Mendota Club v. Anderson, 101 W. 479 - - - - - 188
Menz v. Beebe, 102 W. 343 - 566
Merchants' & M. S. Bank v. Lovejoy, 84 W. 601 - - 48
Merrill v. Best, 116 W. 121 268
Mikkelson v. Truesdale, 63 Minn. 137 - - - - - 416
Miles v. Mut. R. F. L. Asso. 108 W. 421 - - - - 564
Miller v. Horton, 152 Mass. 541 159
——— v. Lea, 35 Md. 396 - 408
——— v. State, 106 W. 156 - 543
——— v. Van Anken, 1 Wend. 516 - - - - - - 278
Milwaukee Co. v. Hackett, 21 W. 613 - - - - - 442
——— v. Isenring, 109 W. 9 18, 439
Milwaukee, E. R. & L. Co. v. Bradley, 108 W. 467 - - 393
Missouri P. R. Co. v. Lewis, 24 Neb. 848 - - - - - 416
Mitchell v. Plover, 53 W. 548 313
Mobile & M. R. Co. v. Jay, 65 Ala. 113 - - - - - 344
Momsen v. Atkins, 105 W. 557 45
Monroe W. W. Co. v. Monroe, 110 W. 11 - - - - - 585
Moore v. Lyons, 25 Wend. 119 269
Moran's Will, *In re*, 113 W. 177 - - - 266, 268, 269
Morgan v. Bishop, 61 W. 407 108
——— v. South Milwaukee L. V. Co. 97 W. 275 - - 341
Morice v. Bishop of Durham, 5 Eng. Rul. Cas. 575 - 167
——— v. ———, 9 Ves. Jr. 399 167
Moritz v. Larsen, 70 W. 569 5
Morrow v. Lander, 77 W. 77 61
Moyer v. Koontz, 103 W. 22 572
Mueller v. Betheseda M. S. Co. 88 Mich. 390 - - - 192
Mullen v. Reinig, 68 W. 408 396
Murphy v. Kirwan, 103 Fed. 104 - - - - - 83
Mygatt v. Tarbell, 85 W. 457 342, 626

Nass v. Schulz, 105 W. 146 - 335
Nehrling v. Herold Co. 112 W. 558 - - - - - - 122
Neis v. Franzen, 18 W. 537 - 250, 254
Nelson v. Russell, 135 N. Y. 137 - - - - - - 269
Newman v. Kershaw, 10 W. 333 - - - - 352, 356
Nicholas v. B., C. R. & N. R. Co. 78 Minn. 43 - - - 416
Nichols v. C., M. & St. P. R. Co. 60 Minn. 319 - - - 416
Nicoud v. Wagner, 106 W. 67 386
Nilson v. Morse, 52 W. 240 - 182, 280
Norcross v. Griffiths, 65 W. 599 - - - - - - 111
Northern Assur. Co. v. Grand View B. Asso. 183 U. S. 308 468
Northern Pacific R. Co. v. McMullen, 86 W. 501 - - 552
Northern S. Co. v. Wangard, 117 W. 620 - 238, 242, 243
Northern T. Co. v. Snyder, 113 W. 516 - 430, 432, 433, 560
Nye v. Swan, 49 Minn. 431 - 345

O'Brien v. C., St. P., M. & O. R. Co. 102 W. 628 - - 647, 648
O'Brien L. Co. v. Wilkinson, 117 W. 468 - - - - 334
Odette v. State, 90 W. 258 - 523
O'Laughlin v. Union Cent. L. Ins. Co. 11 Fed. 280 - - 367
Olwell v. Milwaukee St. R. Co. 92 W. 334 - - - - - 368
Orlando v. Pragg, 31 Fla. 111 157
Orton v. Noonan, 32 W. 220 - 395
Orttel v. C., M. & St. P. R. Co. 89 W. 127 - - - - - 625
Owen v. Long, 97 W. 33 - 66
Owings v. Hull, 9 Pet. 607 - 344

Packard v. Kinzie Ave. H. Co. 105 W. 323 - - - - - 557
Page v. Kennan, 38 W. 320 - 547
Park v. Richardson & B. Co. 81 W. 399 - - - - - 8
Parroski v. Goldberg, 80 W. 339 - - - - - - 41
Parsons v. Waukesha Co. 83 W. 288 - - - - - 440
Paul v. Virginia, 8 Wall. 168 284
Paulson v. State, 118 W. 89 145, 150
Patton v. Ludington, 103 W. 629 - - - - - - 268
Pearsall v. Dwight, 2 Mass. 84 417, 418
Pearson v. Zehr, 138 Ill. 48 - 159
Pennoyer v. Neff, 95 U. S. 714 572
Pennsylvania Co. v. Versten, 140 Ill. 637 - - - - 620
People v. Austin, 1 Parker, Cr. R. 166 - - - - - - 538
——— v. Beckwith, 103 N. Y. 360 - - - - - - 538
——— v. Boscovitch, 20 Cal. 436 - - - - - - 121
——— v. Clark, 7 N. Y. 385 - 538
——— v. Clough, 17 Wend. 351 138, 139
——— v. Conroy, 97 N. Y. 62 - 538
——— v. Garnett, 29 Cal. 625 121
——— v. Hall, 48 Mich. 482 - 121
——— v. Hawkins, 109 N. Y. 408 - - - - - - 538
——— v. Knapp, 71 Cal. 1 - 620
——— v. McCarty, 117 Cal. 65 121
——— v. Molineux, 168 N. Y. 264 - - - - - - 146
——— v. Wolf, 95 Mich. 625 - 535
People *ex rel.* Copcutt v. Board of Health, 140 N. Y. 1 - - 157
Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202 - - - 365
Perin v. Carey, 24 How. 465 - 169
Perkins v. McAuliffe, 105 W. 582 - - - - - - 56
Perry v. Tynen, 22 Barb. 137 - 616
Perugi v. State, 104 W. 230 513, 533, 542
Pewaukee M. Co. v. Howitt, 86 W. 270 - - - - - - 329
Phenix Ins. Co. v. R. B. H. Lodge, 41 Neb. 21 - - 598
Phinney v. Watts, 9 Gray, 269 112
Pierce v. C. & N. W. R. Co. 36 W. 283 - - - - - - 596
Platt v. Munroe, 34 Barb. 291 606
——— v. Schmidt, 115 W. 394 396
Pointer v. United States, 151 U. S. 396 - - - - - 517
Polley v. Johnson, 52 Kan. 478 47
Poposkey v. Munkwitz, 68 W. 332 - - - 90, 321, 329
Portance v. Lehigh Valley C. Co. 101 W. 574 - - - 419
Porter v. Beattie, 88 W. 22 - 241
Port Huron E. & T. Co. v. Clements, 113 W. 249 - 396
Potter v. Taggert, 54 W. 395 183
Powell v. Ashland I. & S. Co. 98 W. 35 - - - - - 310
Pratt v. Peck, 70 W. 620 - 175
——— v. S. Freeman & Sons Mfg. Co. 115 W. 648 - - 325
Price v. Wisconsin M. & F. Ins. Co. 43 W. 267 - 408, 409
Prickett v. Muck, 74 W. 199 109

Prideaux v. Mineral Point, 43 W. 524 - - - - 229
Prince v. Overholser, 75 W. 646 - - - - 238, 241
Pringle v. Dunn, 37 W. 449 46
Pritzlaff H. Co. v. Berghoefer, 103 W. 359 - - - - 6
Promer v. M. L. S. & W. R. Co. 90 W. 215 - - 419, 420
Proper v. State. 85 W. 615 123, 124
Putney v. Farnham, 27 W. 187 - - - - - 341

Quirk v. Holt, 99 Mass. 164 309

Railroad Co. v. Schurmeir, 7 Wall. 272 - - - - 82
Rainwater v. Elmore, 1 Heisk. 363 - - - - - 121
Ramsay v. Hommel, 68 W. 12 61
Rand v. Butler, 48 Conn. 293 265
Ray v. Northrup, 55 W. 396 201
Raymond v. Fish, 51 Conn. 80 160
Redman v. Hartford F. Ins. Co. 47 W. 89 - - - 598
Reg v. Hensler, 11 Cox, Cr. Cas. 570 - - - - 138
——— v. Jones, Temp. & M. 270 - - - - - 138
Reindl v. Heath, 109 W. 570 172
Renier v. Dwelling House Ins. Co. 74 W. 94 - 461, 464-467
Renlund v. Commodore M. Co. (Minn.) 93 N. W. 1057 - - 415
Renne v. U. S. Leather Co. 107 W. 320 - - - - - 65
Rex v. Dale, 7 Carr. & P. 352 144
Rhyner v. Menasha, 107 W. 201 387
Richardson v. Cheynoweth, 26 W. 656 - - - - - 90
——— v. N. Y. C. R. Co. 98 Mass. 85 - - - 416, 417
Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386 - - - 367
Robbins v. Deverill, 20 W. 142 410
——— v. Springfield F. & M. Ins. Co. 149 N. Y. 477 - - 469
Roberts v. Continental Ins. Co. 41 W. 321 - - - 461
——— v. McGrath, 88 W. 52 - 335
——— v. State, 122 Ala. 47 - 120
Rockford, R. I. & St. L. R. Co. v. Phillips, 66 Ill. 548 - - 641
Rockwell v. Humphrey, 57 W. 410 - - - - - - 319
——— v. Nearing, 35 N. Y. 308 156
Rœhrborn v. Schmidt, 16 W. 519 - - - - - - 250
Rogers v. Elliott, 59 N. H. 201 48
——— v. Verona, 1 Bosw. 417 564
Rood v. C., M. & St. P. R. Co. 43 W. 146 - - - - 20
Rooks v. State, 65 Ga. 330 - 121
Rooney v. Milwaukee Co. 40 W. 23 - - - - - - 442
Rosenkrans v. Kline, 42 W. 558 395
Rowell v. Williams. 54 W. 636 46
Rowlands v. Vœchting, 115 W. 352 - - - - - - 46
Ruhland v. Hazel Green, 55 W. 664 - - - - 609, 610
Rundle v. Delaware & R. C. Co. 14 How. 80 - - - 82
Russell v. Horn, B. & F. Mfg. Co. 41 Neb. 567 - - - 192
Ryan v. Rockford Ins. Co. 85 W. 573 - - - - - - 202
Ryan Drug Co. v. Hvambsahl, 89 W. 61 - - - - - 41

St. Clara F. Academy v. N. W. Nat. Ins. Co. 98 W. 257 - 461
St. Croix Co. v. Webster, 111 W. 270 - - - - - - 430
Saladin v. Kraayvanger, 96 W. 180 - - - - - - 115
Salem v. E. R. Co. 98 Mass. 431 155
Salladay v. Dodgeville, 85 W. 318 - - - - - - 522
Sanford v. Spencer, 62 W. 230 313
Sargent's Estate, 62 W. 130 - 379
Schlenker v. State, 9 Neb. 300 536
Schnur v. Hickcox, 45 W. 200 666
Schomer v. Hekla F. Ins. Co. 50 W. 575 - - - - - 469
Schraer v. Stefan, 80 W. 653 - 606
Schroeder v. Galland, 184 Pa. St. 277 - - - - - - 295
——— v. W. C. R. Co. 117 W. 33 35
Schultz v. Caledonian Ins. Co. 94 W. 42 - - - - - 461
——— v. C. & N. W. R. Co. 44 W. 638 - - - - - 423
Schumaker v. Heinemann, 99 W. 251 - - - 90, 93, 330
Scott v. West, 63 W. 529 - 268
Scott L. Co. v. Hafner-Lothman Mfg. Co. 91 W. 667 - 325
Scoville v. Canfield, 14 Johns. 338 - - - - - 417, 418
Scribner v. Blute, 28 W. 148 - 101
Scudder v. Union Nat. Bank, 91 U. S. 406 - - 355, 357
Seamans v. Carter, 15 W. 548 285
——— v. Knapp-Stout Co. Co. 87 W. 171 - - - - - 357
——— v. ———. 89 W. 171 - 354, 355, 418
Second Nat. Bank v. Smith, 118 W. 18 - - - - 356

Sellers v. Lampman, 63 W. 257 - - - - - - 579
Sentell v. N. O. & C. R. Co. 166 U. S. 698 - - - - - 156
Shadbolt & B. I. Co. v. Topliff, 85 W. 513 - - 90, 93, 192
Shaver v. Murdock, 36 Cal. 293 - - - - - - - 295
Shaw v. First Baptist Church, 44 Minn. 22 - - - - - 295
——— v. Gilbert, 111 W. 165 144, 242, 243
Shepard v. Milwaukee G. L. Co. 15 W. 318 - 90, 93, 321
Shilling v. Mullen, 55 Minn. 122 - - - - - - - 594
Shores L. Co. v. Stitt, 102 W. 450 - - - - - 352, 356
Sigerson v. Cushing, 14 W. 527 280
Simonson v. Stachlewicz, 82 W. 328 - - - - - 626
Simpson v. State, 56 Ark. 8 - 536
Skinner v. Norman, 165 N. Y. 565 - - - - - - - 469
Skobis v. Ferge, 102 W. 122 - 594
Small v. Comm. 91 Pa. St. 304 534
——— v. Prentice, 102 W. 256 45
Smith v. Brady, 17 N. Y. 173 6, 8
——— v. Davis, 1 W. 447 - 305
——— v. Dragert, 61 W. 222 396
——— v. Gould, 61 W. 31 - 158
——— v. Lander, 48 W. 587 201
——— v. Leland, 2 Duer. 497 563, 564
——— v. School Dist. 20 Conn. 312 - - - - - - 6, 8
——— v. Smith, 116 W. 570 - 268
——— v. State, 4 Lea, 428 - 121
——— v. Tritt, 18 N. C. (1 Dev. & B.) 241 - - - - - 47
Sohns v. Sloteman, 85 W. 113 278
Sondheim v. Gilbert, 117 Ind. 71 - - - - - - - 352
Soule v. State, 19 W. 593 - 71
South Milwaukee B. H. Co. v. Harte, 95 W. 592 - - 108
South Milwaukee Co. v. Murphy, 112 W. 614 - - 564
Spalding v. New Hampshire F. Ins. Co. 71 N. H. 441 - 469
Sparrow v. Pond, 49 Minn. 412 48
Spaulding v. C. & N. W. R. Co. 33 W. 582 - - - 258
Stafford v. Chippewa Valley E. R. Co. 110 W. 331 - - 648
Stanhilber v. Mut. Mill. Ins. Co. 76 W. 285 - - - 461
State v. Atwood, 11 W. 422 - 285
——— v. Brown, 41 Minn. 319 539
——— v. Carver, 22 Oreg. 602 535
State v. Citizens' Ins. Co. 71 W. 411 - - - - - - 548
——— v. Cole, 19 W. 129 - 146
——— v. Crowley, 41 W. 271 135, 139
——— v. Egerer, 55 W. 529 - 548
——— v. Foster, 61 Mo. 549 - 536
——— v. Fuller, 114 N. C. 885 535
——— v. Green, 7 W. 676 - 139
——— v. Hobbs, 37 W. Va. 812 536
——— v. Kilgore, 70 Mo. 548 - 522
——— v. Lautenschlager, 22 Minn. 514 - - - - - 539
——— v. Lentz, 45 Minn. 177 539
——— v. Logue, 73 W. 598 250, 252
——— v. Matthews, 91 N. C. 685 - - - - - - - 139
——— v. McCormick, 27 Iowa, 402 - - - - - - - 536
——— v. Mills, 17 Me. 211 - 144
——— v. Payne, 10 Wash. 545 535
——— v. Stœckli, 71 Mo. 559 - 522
——— v. Styner, 154 Ind. 131 139
——— v. Turner, Wright (Ohio) 20 - - - - - 516
——— v. Wentler, 76 W. 89 117, 123, 125, 126, 128, 129
State *ex rel.* Adamson v. Collier, 62 Mo. App. 38 - - 379
——— Att'y Gen. v. Frost, 113 W. 623 - - - - - - 552
——— Badger I. Co. v. Anderson, 97 W. 114 - - - 175
——— Bell v. Harshaw, 76 W. 230 - - - - - - - 581
——— Boycott v. Mayor, 107 W. 654 - - - - - 300, 301
——— Dwinnell v. Gaylord, 73 W. 316 - - - - - 286
——— Fourth Nat. Bank v. Johnson, 103 W. 591 - 503
——— Gaster v. Whitcher, 117 W. 672 - - - 348, 349
——— Graef v. Forest Co. 74 W. 610 - - - - 19
——— Hallauer v. Gosnell, 116 W. 606 - - - - 601
——— Hiles v. Wood Co. 61 W. 278 - - - - - 575
——— Iola v. Nelson, 57 W. 147 250
——— Jenkins v. Harland, 74 W. 11 - - - - - - - 250
——— Martin v. Kalb, 50 W. 178 - - - - - - - 442
——— Meggett v. O'Neill, 104 W. 227 - - - - - 503
——— Milwaukee v. Ludwig, 106 W. 226 - - - 503
——— Milwaukee St. R. Co. v. Anderson, 90 W. 550 503, 585, 586

State *ex rel.* Mitchell v. Johnson, 105 W. 90 - - - 503
——— Moore v. Ashland, 88 W. 599 - - - - - 302
——— New Richmond v. Davidson, 114 W. 563 - - 504
——— Peck v. Riordan, 24 W. 484 - - - - - - 442
——— Runge v. Anderson, 100 W. 523 - - - - - 221
——— Schintgen v. La Crosse, 101 W. 208 - - - - 601
——— Tewalt v. Pollard, 112 W. 232 - - - - - 504
——— Weinsheim v. Leischer, 117 W. 475 - - - - 21
——— Wood v. Baker, 88 W. 71 221
Stebbins v. Lathrop, 4 Pick. 33 379
Steele v. Dunham, 26 W. 393 158
Stein v. Benedict, 83 W. 603 71
Stewart v. B. & O. R. Co. 168 U. S. 445 - - - - - 416
Stiles v. Neillsville M. Co. 87 W. 271 - - - - - - 66
Stokes v. People, 53 N. Y. 164 533, 535, 538
——— v. Weston, 142 N. Y. 433 269
Straker v. Phenix Ins. Co. 101 W. 413 - - - - - - 464
Stringer v. Frost, 116 Ind. 477 309
Strong v. State, 86 Ind. 208 - 139
——— v. Stevens Point, 62 W. 265 - - - - - - 229
Suggs v. Travelers' Ins. Co. 71 Tex. 579 - - - - - 367
Sullivan v. State, 100 W. 283 542
Swarthout v. Swarthout, 111 W. 102 - - - - - - 165
Sydnor v. Palmer, 29 W. 249 114

Taft v. Montague, 14 Mass. 282 6
T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co. 91 W. 667 325
Teetshorn v. Hull, 30 W. 162 548
Terrill v. State, 95 W. 276 - 542
Texas & P. R. Co. v. Cox, 145 U. S. 593 - - - - - 416
Thacher v. Pray, 113 Mass. 291 344
Tobey v. McAllister, 9 W. 463 56
Todhunter v. Stewart, 39 Ohio St. 181 - - - - - - 379
Topliff v. Topliff, 122 U. S. 121 280
Torrey v. Shawano Co. 79 W. 152 - - - - - - 313
Treat v. Hiles, 81 W. 280 90, 93, 329
Troewert v. Decker, 51 W. 46 351
Tucker's Will, *In re*, 63 Vt. 104 - - - - - - 265
Tuley v. Barton, 79 Va. 387 - 14
Tutt v. Hawkins, 53 Neb. 367 220
Twohy M. Co. v. McDonald's Estate, 108 W. 21 - - 14
Two Rivers Mfg. Co. v. Beyer, 74 W. 210 - - - - - 668
——— v. Day, 102 W. 328 - 598, 625

Ullman v. C. & N. W. R. Co. 112 W. 150 - - - - - 80
Uren v. Walsh, 57 W. 98 - 70
U. S. v. White, 5 Cranch, C. C. 88 - - - - - - 121
U. S. Express Co. v. Jenkins, 64 W. 542 - - - - - 526

Van Axte v. Fisher, 117 N. Y. 401 - - - - - - 269
Vance v. Davis, 118 W. 548 - 635
Vanderpool v. L. C. & M. R. Co. 44 W. 652 - - - 285
Van Slyke v. Lettice, 6 Hill. 610 - - - - - - 278
Van Valkenburgh v. Hoskins, 7 W. 496 - - - - - 606
Verges v. Milwaukee Co. 116 W. 191 - - - 18, 442
Vilas v. Bundy, 106 W. 168 - 268
——— v. Mason, 25 W. 310 - 626
Vollmer v. C. & N. W. R. Co. 86 W. 305 - - - - - 305
Vollner v. Berens, 50 W. 494 - 309
Vorbrich v. Geuder & P. Mfg. Co. 96 W. 277 - - 257, 258
Wagg-Anderson W. Co. v. Dunn, 92 W. 409 - - - 41
Wagner v. Milwaukee Co. 112 W. 601 - - - - - - 18
Waite v. Vose, 62 Me. 188 - 344
Wals v. Grosvenor, 31 W. 681 547
Walsh v. Fisher, 102 W. 172 - 5, 6
——— v. N. Y. & N. E. R. Co. 160 Mass. 571 - - - - 416
Ward v. C., M. & St. P. R. Co. 102 W. 223 - - - - 402
Ware v. Houk (Com. Pl.) 23 Wkly. Law Bul. 205 - - 82
Warner v. Benjamin, 89 W. 290 - - - - - - 242
Waters-Pierce O. Co. v. Texas, 177 U. S. 28 - - - - 284
Watts v. Holland, 56 Tex. 60 121
Wells v. Remington, 118 W. 573 - - - - - - 228
Weyman v. People, 4 Hun, 511 146
——— v. ———, 62 N. Y. 623 146
Wheeler v. Northwestern S. Co. 39 Fed. 347 - - - 314
Wheeling Bridge Case, 18 How. 439 - - - - - 21
Whipple v. Foot, 2 Johns. 418 47

White v. Merrell, 32 Ill. 511 - 14
Whitham v. Mappes, 89 W. 671 396
Whitman v. Oxford Nat. Bank, 176 U. S. 559 - - - 416
Wickes v. Lake, 25 W. 71 - 46
Wickman v. Robinson, 14 W. 493 - - - - - - 56
Widman v. Gay, 104 W. 277 - 5
Williams v. Chadbourne, 6 Cal. 559 - - - - - 563
——— v. Giblin, 86 W. 150 250, 253
——— v. Mitchell, 49 W. 284 250
——— v. State, 83 Ala. 16 - 536
——— v. Thrall, 101 W. 337 5, 6, 8
——— v. Williams, 102 W. 246 662
——— v. ———, 117 W. 125 - 667
Williamson v. State, 74 W. 263 - - - - - - 146
Willis v. Moore, 59 Tex. 628 - 47
Willow River Club v. Wade, 100 W. 108 - - - - - 82
Wilson v. Groelle, 83 W. 539 596
——— v. Waltersville School Dist. 46 Conn. 400 - - 616
Wiltse v. Tilden, 77 W. 152 - 228
Windross v. McKillop, 98 W. 525 - - - - - - 566
Winkler v. Racine W. & C. Co. 99 W. 184 - - - - - 182
Winner v. Hoyt, 68 W. 278 - 596
Wis. Ind. School v. Clark Co. 103 W. 662 - - - - - 348
Wis. Tel. Co. v. Krueger, 115 W. 150 - - - - - 20
Wolfe v. M. P. R. Co. 97 Mo. 473 - - - - - - 409
Wollman v. Ruehle, 104 W. 603 - - - - - - 653
Wood v. Am. F. Ins. Co. 149 N. Y. 382 - - - - - 469
Wooden v. W. N. Y. & P. R. Co. 126 N. Y. 10 - - 416
Woodward v. M. S. & N. I. R. Co. 10 Ohio St. 121 - - 417
Wright v. Mulvaney, 78 W. 89 - - - - - 90, 329
——— v. Young, 6 W. 127 - 183
Wunderlich v. Palatine F. Ins. Co. 104 W. 395 - - - 648
Wyman v. Kimberly-Clark Co. 93 W. 554 - - - 284
Yates v. Milwaukee, 92 W. 352 - - - - - - 581
Yellow River Imp. Co. v. Wood Co. 81 W. 554 - - 585
Yerkes v. N. P. R. Co. 112 W. 184 - - - - - - 625
Young v. Harrison, 6 Ga. 132 82
Younkin v. Milwaukee L. H. & T. Co. 112 W. 15 - - 485
Zehren v. Milwaukee E. R. & L. Co. 99 W. 83 - - - 483
Zell v. Herman F. Ins. Co. 75 W. 521 - - - - - 461
Zimmerman v. Gerdes, 106 W. 608 - - - - - - 572

CASES DETERMINED

AT THE

August Term, 1903.

MANITOWOC STEAM BOILER WORKS, Respondent, vs. MANITOWOC GLUE COMPANY, imp., Appellant.

November 18—December 11, 1903.

Entire contracts: Exceptions: Measure of damages: Sales: Substantial performance: Acceptance: **Prima facie** ***evidence: Values: Pleading: Amendment to conform to proofs: Appeal and error: Reversal.***

1. In applying the recognized exceptions to the rule, that he who makes an entire contract can recover no compensation unless he performs it entirely and according to its terms, the question is never what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed.
2. Where plaintiff contracted to manufacture and place in defendant's factory a boiler that should be 150 per cent. of the capacity of the boiler then in use, and the increase of capacity was the vital and essential part of the contract, furnishing a boiler found by the court to be about eighty-two per cent. of the capacity of the old one is in no sense substantial performance of the contract.
3. In an action for the price of a boiler furnished under a contract for a boiler of greater capacity than that actually installed, the evidence reviewed, and *held* insufficient to sustain a finding of acceptance of the boiler furnished.
4. In an action for the price of a boiler furnished under a contract for a boiler of a greater capacity than that actually installed, evidence of mere use of the boiler in connection with defendant's premises, with which it had been connected, is not enough to overcome evidence, in effect, that defendant, upon protesting its insufficiency, conveyed to plaintiff its wish and expectation that it be removed, and that plaintiff fully understood

such election, and allowed the boiler to remain in breach of an agreement to remove it, because of an erroneous construction of the contract.

5. In an action for the price of a boiler furnished under a contract for a boiler of greater capacity than that actually installed, the contract price is not *prima facie* proof of its value.

6. In such case, testimony by defendant's manager, in effect, that if a boiler, such as contracted for, was worth $2,035, the value of such a one as delivered was proportionally less as the capacity, but said, "I can't state the market value of that boiler at the time I received it any more than what Mr. H. (plaintiff's witness) valued it at," cannot be construed into an admission that the market price was as much as H.'s valuation.

7. On the trial of an action for the price of a boiler, the real controversy had been as to the capacity of the boiler. At the close of the trial there was no evidence to support a recovery on the contract, or to support a cause of action *quantum meruit*, but the court nevertheless entered an order that plaintiff might amend its complaint by adding a count *quantum meruit*, and that defendant might answer thereto simply by general denial, and could introduce no other defense. *Held*, error, to be corrected by reversing the judgment and directing a judgment dismissing the complaint.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover the contract price and enforce a lien for supplying a steam boiler to the defendant. The evidence disclosed that the defendant operated a glue factory, requiring a large amount of steam, not only for power, but also for heating and drying; that it had an old tubular boiler, which had been manufactured by the plaintiff, and with which and its use the plaintiff was entirely familiar; that in such situation the parties negotiated for a new boiler, the defendant stating to the plaintiff that the old boiler was inadequate—that it had a commercial rating of about eighty horse power, and that one was needed of about 100 horse power. The plaintiff's manager counseled one still larger, namely, to rate about 125 horse power, as compared with the old one, eighty horse power. The agreement finally reached was that the new one should be substantially of fifty per cent. more ca-

pacity than the old, but was to be of the Scotch type, instead of the tubular type. Plaintiff constructed a boiler of the Scotch type, put it in place in a building and upon brick foundation constructed by the defendant for that purpose. After it was connected up, it was found disappointing in capacity, and not up to the old boiler, but was used, in connection with the old one, to furnish the steam necessary for the factory, while efforts were made both by plaintiff and defendant to make it work more efficiently. These efforts being still unsatisfactory, the defendant complained of the boiler as not satisfying the contract, and, as the defendant's manager testifies, desired to have it taken away. The plaintiff's manager testifies that thereupon he proposed to have a test made, and, if it did not satisfy the contract, he would either take it out and put in a new one, or enlarge it so as to make it of the necessary capacity. That test was made, the plaintiff contending that it showed the boiler to satisfy the contract, the defendant contending that it did not, but meanwhile using the boiler to supply in part the steam needed to keep its factory running. The date of this test is not disclosed, but it was some time in the autumn of 1898, and this suit was commenced on the 31st day of January, 1899. The defendant's original answer set up by way of defense the failure to perform the contract, and by way of counterclaim sought to recover $1,100 which it had paid upon the price thereof, certain additional expense occasioned by delay in the delivery of the boiler, and additional expense for wages and fuel by reason of the necessity of running two boilers. In the course of the trial defendant announced that it preferred to stand simply upon its defense that plaintiff had not performed its contract, and therefore asked leave to withdraw its counterclaims, which was granted by the court. At the close of the evidence the court made findings to the effect that the contract was as above stated, and that the boiler put in, instead of being fifty per cent. greater capacity than the

old one, was about twenty per cent. less capacity, and announced that upon the then state of the pleadings the defendant would be entitled to a judgment dismissing the complaint, but, on the theory that the defendant had offered some evidence of the reasonable value of the boiler and had accepted the same, the court entered an order that the plaintiff might amend its complaint by adding a count in *quantum meruit,* and that the defendant might answer thereto simply by general denial, and could introduce no other defense, and that, when such pleadings were in, the action be postponed to the ensuing term, in order that evidence might be taken upon the new issue. To these orders the defendant took exception. The plaintiff did amend in the manner indicated, and the defendant introduced the only answer permitted—that of a general denial. Thereupon, at the ensuing term, the plaintiff introduced evidence of experts of what it would cost to build such a boiler as that supplied to the defendant. Defendant offered no further evidence, except by way of cross-examination, to show by these experts that the boiler supplied would be worth approximately $1,800 less than a boiler of the capacity found to have been contracted for. Thereupon the court made findings that the plaintiff had substantially performed its contract, except that, instead of a boiler fifty per cent. greater than the old one, it had supplied one of about twenty per cent. less capacity; that defendant had accepted the boiler; and that the reasonable value thereof was the original contract price of $2,035, for which, less the payments, judgment was rendered, from which the defendant brings this appeal.

For the appellant there was a brief by *J. S. Anderson,* attorney, and *Emil Baensch,* of counsel, and oral argument by *Mr. Anderson.*

For the respondent there was a brief by *Markham & Markham* and *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

DODGE, J. The result of this action, whereby the defendant is required to pay the full contract price for a boiler of only about one half the capacity or value of that for which it agreed to pay it, is somewhat startling, especially in view of the consideration, understood by both parties, that its only reason for buying a new boiler at all was that the operation of the factory required more steam than the old one could supply. Before reaching such a result, a court should pause to re-examine the rules of law or processes of reasoning upon which it is based. If the law warrants it, the force or value of a contract seems to have vanished. The contractor receives the same compensation for nonperformance as for performance. The general rule of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its terms. *Moritz v. Larsen,* 70 Wis. 569, 36 N. W. 331; *Cohn v. Plumer,* 88 Wis. 662, 60 N. W. 1000; *Widman v. Gay,* 104 Wis. 277, 80 N. W. 450. This general rule has, with considerable hesitation, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship: First, in favor of laborers who contract to perform personal services, and without fault of either party fail of complete performance (*Diefenback v. Stark,* 56 Wis. 462, 466, 14 N. W. 621; *Walsh v. Fisher,* 102 Wis. 172, 78 N. W. 437; *Hildebrand v. Am. F. A. Co.* 109 Wis. 171, 85 N. W. 268); secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment (*Malbon v. Birney,* 11 Wis. 107; *Fuller-W. Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683; *Williams v. Thrall,* 101 Wis.

337, 76 N. W. 599; *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *John Pritzlaff H. Co. v. Berghoefer,* 103 Wis. 359, 79 N. W. 564; *Taft v. Montague,* 14 Mass. 282; *Smith v. School Dist.* 20 Conn. 312; *Bozarth v. Dudley,* 44 N. J. Law, 304; *Smith v. Brady,* 17 N. Y. 173; *Dermott v. Jones,* 2 Wall. 1); and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, having full opportunity to reject without loss or injury, decides to accept and retain the thing furnished. This third phase is hardly an exception, for such voluntary acceptance may well be deemed the making of a new contract to take and pay reasonably for the article which does not satisfy the original contract. *Fuller-W. Co. v. Shurts, supra; Williams v. Thrall, supra.* In case of either of these exceptions, great caution is due in order that the innocent purchaser shall not suffer. If loss must fall anywhere, it should rest on him who breaks the contract. As said in *Allen v. McKibbin,* 5 Mich. 449, 455, and quoted approvingly in *Walsh v. Fisher, supra,* "the party in default can never gain by his default, and the other party can never be permitted to lose by it." *Bishop v. Price,* 24 Wis. 480. The question, therefore, in such cases, is never what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed? The recovery is *quantum valebat* from the innocent purchaser's point of view.

Proceeding to ascertain how far these principles are applicable to the situation at bar, we are confronted by the fact that substantial performance of the express contract is wholly wanting. The finding is that the boiler furnished was about eighty-two per cent. of the capacity of the old one, instead of 150 per cent., and that the increase of capacity was the vital and essential part of the contract. This is in no sense substantial performance. The boiler does not serve at all the purpose which the larger one would have served, and for

which it was purchased. Defendant can obtain that for which it contracted, and for which it agreed to pay $2,035, and which is necessary to the purpose which induced the contract, in only one of two ways: either it can remove this boiler from its premises at large expense, if plaintiff does not remove it, and purchase and put in place another of the required size; or it can retain it, and put in another of substantially equal capacity as auxiliary to it, and at a cost equal to or greater than the original contract price, and probably necessitating reconstruction of its boiler house. One in such predicament cannot be said to have received in substance that for which he contracted. *Malbon v. Birney,* 11 Wis. 107; *Fuller-W. Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683. Neither do we discover either finding or proof that defendant had accepted the boiler, had decided to keep it, and use it so far as it will go toward supplying the needed steam. True, the trial court argues that it would be inequitable to allow defendant to keep the boiler and pay nothing for it, but does not find that it has elected to do so. The only finding is that it is not shown by a preponderance of the evidence that defendant rejected the boiler, or demanded its removal, though he did protest that it did not satisfy the contract. The evidence is that defendant never in words ordered plaintiff to remove the boiler, but from the testimony of the same witness (plaintiff's manager) it appears that defendant, at the time of protesting the insufficiency, did convey to plaintiff its wish and expectation that it be removed. That witness testified that upon such protest he agreed that he would remove the boiler if on test it did not come up to contract requirement. The test was made, the capacity ascertained, but the plaintiff's contention thereafter was that the contract was other than it is now found to have been, and for that reason did not remove it. This testimony fully confirms that of defendant's manager that he desired to have the boiler removed, and negatives any inference that it remained on

defendant's premises pursuant to an election on its part to keep it. Another important consideration was that defendant's entire pleading was based on the theory of nonacceptance. The answer denied performance of the contract, and sought by counterclaim to recover back the portion of the purchase price paid, and the expenses which must fall on defendant and be lost if the boiler was removed, but did not ask to recover the difference in value between the contract boiler and the actual one, which would be the principal element of damage if the boiler were to be retained. *Boothby v. Scales,* 27 Wis. 626; *Park v. Richardson & B. Co.* 81 Wis. 399, 51 N. W. 572. Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. Thus one whose land has been plowed by another cannot be said to accept that plowing as a service merely because he sows seed and raises a crop on the land. *Smith v. Brady,* 17 N. Y. 188. Nor because a city runs sewerage through filter beds at its sewer outlet does it necessarily accept them. *Madison v. Amer. San. Eng. Co.* 118 Wis. 480, 95 N. W. 1097. Nor because the owner lives in his house, and uses the defective furnace therein, does he necessarily accept the latter. *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 599; *Fuller-W. Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683. Nor because one takes his own logs does he accept the cutting and driving done upon them by another. *McDonald v. Bryant,* 73 Wis. 20, 26, 40 N. W. 665. In *Smith v. School Dist.* 20 Conn. 312, it was held sufficient to negative inference of acceptance of school house that the district had "done nothing to prevent its removal by the builder." See, also, *Bozarth v. Dudley,* 44 N. J. Law, 304. From such considerations it is clear

that the mere use of this boiler in connection with its own premises, with which it had been connected, is not enough to overcome the foregoing evidence that defendant up to the time of the trial had elected not to accept or retain the boiler, but wished it removed, and that plaintiff fully understood such election, and had allowed said boiler to remain in breach of its agreement to remove it, because of an erroneous construction of the contract. Further, at the close of the trial, before the amendments changing the cause of action, no evidence of the value of the boiler, in the sense above defined, had been received in evidence. The trial court seemed to hold that the contract price was *prima facie* proof of the value. We can hardly conceive a more complete solecism than the doctrine that the contract price of a 250 horse power boiler is presumptively the value of one of 140 horse power. If the contract price proves anything, it proves that the actual boiler was not worth $2,035, but some less sum. The suggestion that defendant's manager had testified that the boiler received was worth the contract price is not borne out by the bill of exceptions. A portion thereof, quoted by the trial court in its decision, is so disassociated from its context as to distort its meaning. The witness had testified that, a boiler such as contracted for being worth $2,035, the value of such a one as delivered was proportionately less as the capacity, to wit, about $900, but said, "I can't state the market value of that boiler at the time I received it any more than what Mr. Hess valued it at." Very clearly this is nothing more than that his opinion as to market values is based solely on Mr. Hess' valuation. The court treats it as if he had said, "I can't state that the market value is any more than Hess valued it," which he then construes into an admission that its market price was as much as Hess' valuation, to wit, the contract price. Clearly, the witness testified nothing of the sort.

The result is that at the close of the trial there was no evi-

dence to support a recovery on the contract, and the court should have rendered judgment dismissing the complaint. Neither was there evidence to support a cause of action *quantum meruit,* to accord with which amendment by the court is authorized by sec. 2830, Stats. 1898. True, the court might conceive that acts subsequent to those disclosed by the proofs might take place, and might constitute acceptance; but could that justify an entire change of issues? The real controversy had been as to the capacity of the boiler contracted for. That issue being decided against it, different courses were open both to plaintiff and defendant. The former might decide to take it away and replace it by one up to the contract requirement, as it had promised to do; or perhaps it might enlarge this particular boiler, as suggested by the evidence; or it might take it away entirely, and stand its liability for damages for entire breach of the contract. The defendant might consent to any of these steps, or it might resist them in such a way as to effectively work an acceptance so as to be liable *quantum meruit.* Indeed, so far as the record discloses, these options are still open to the parties, if not foreclosed by the judgment appealed from. What propriety, then, could there be in requiring the parties to join entirely new issues, perhaps involving transactions subsequent to the commencement of this action, and in effect creating new contract relations, which might all properly be tried in a new suit brought for that purpose, to which defendant would have absolute right to set up all its defenses? And especially how can we justify the act of the trial court in depriving defendant of its statutory right to set up all its defenses and counterclaims to the new cause of action thus brought against it? It had not at all waived that right by deciding not to urge some of them against the cause of action which had been on trial. We do not mean to detract from the very broad discretion vested in the trial courts to allow amendments in the course of the trial. If we could discover

that the parties, without protest, had tried out the question of a liability arising from acceptance of the boiler, we should probably not disturb the action of the court in causing formal amendments to enable final judgment upon the issues so tried; but, as already stated, we find nothing of the sort in the record. The circuit judge based the allowance of the amendment and his exercise of discretion on a mistaken assumption therefore, namely, that there was evidence with which such amendment corresponded. So extraordinary and unjustifiable an order we must assume that he, in due exercise of discretion, would not have made but for such mistake. In the absence of such foundation, we must hold it erroneous. It is an error which can be corrected by reversing the present judgment and directing that which ought to have been done at the time, namely, the rendition of a judgment dismissing the complaint, which, of course, will not prejudice an action outside of the contract sued on in this.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

SEEGER, Respondent, vs. MANITOWOC STEAM BOILER WORKS, Appellant.

November 18—December 11, 1903.

Contracts: Receipts: Parol evidence.

A writing—"Received $200 from S. to balance boiler account in full"—is a mere receipt, and parol evidence of a contemporaneous agreement that the boiler installed should remain in place for the purpose of giving the contractor an opportunity to remedy any defects and the purchaser to ascertain whether it satisfied the contract of purchase, is admissible.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action against appellant, a corporation, to recover the sum of $300, with interest, paid to apply on a steam

heating boiler, if the same proved satisfactory and was accepted by respondent. The referee found the following facts:

'On February 6, 1895, appellant agreed to furnish and place a steam heating boiler . . . with jacket, grates, steam gauge, safety valve, water column and damper regulator, make all connections complete for the sum of $300.00. If boiler does not prove satisfactory, we agree to remove the same at our expense, replace the old boiler and make all connections. Terms of payment to be arranged after boiler has been accepted.'

This boiler was to be placed in the basement of respondent's two-story brick building, in the city of Manitowoc. It was to be used as the steam boiler of the heating plant, which was designed and constructed to heat all the rooms and offices in this building while used and occupied by respondent and his tenants. Appellant immediately thereafter placed this steam boiler in the basement of this building, and connected it with the heating plant. This was done in the latter part of the winter of 1895, and it was used by respondent up to December 16th, when he notified appellant that it was not satisfactory, and he could not accept it under the agreement. Respondent paid appellant the purchase price of the boiler—$100 April 6, 1895, and $200 December 16, 1895. When the last payment was made, the following written memorandum was signed and delivered:

"Dec. 16, 1895. Received $200.00 from Seeger Bros. to balance boiler account in full. Wm. J. Hess, M. S. B. Wks."

The referee found that at the time of this payment it was orally agreed between the parties that this payment should be received in full of the purchase price, but should not be deemed an acceptance of the contract, and that defects in construction and operation of the boiler should be remedied by appellant. Thereafter appellant operated the boiler, with the view of correcting such defects, up to some time in December, 1898, when all attempts to perfect it were aban-

doned, and respondent rejected it as unsatisfactory and as failing to comply with the agreement of purchase. Appellant avers that the boiler fulfilled the conditions of the contract in all respects, and that it was understood by the parties at the time of payment of the $200, on December 16, 1895, that he accepted it under the contract as satisfactory. The court sustained the referee's finding of facts, and awarded judgment thereon in favor of respondent for the sum demanded, with interest and costs, less the amount of appellant's counterclaim. From this judgment, this appeal is taken.

For the appellant there was a brief by *Markham & Markham* and *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

SIEBECKER, J. Was it error for the trial court to receive testimony tending to show, when the receipt of December 16, 1895, for $200, "to balance boiler account in full," was executed, that the parties made a contemporaneous agreement to the effect that the receipt should not be deemed an acceptance of the boiler, and as not satisfactory to respondent under the contract of purchase? The contention that the written receipt on its face imports more than a mere receipt seems not well founded. The language, "to balance boiler account in full," in its natural and ordinary significance, when applied to the transaction it covers, means what is usually understood in affairs of a commercial nature by "received payment in full." Such a receipt imports no more than that the amount of money specified was in fact received. When language in a receipt of this nature is applied to transactions between parties, which, under the circumstances, covers some agreement in addition to the written admission that money was in fact paid, then the receipt may present elements of a contract,

and would then come within the rule that a written contract cannot be varied, contradicted, or modified by parol evidence. But no such situation is presented in this case. *Twohy M. Co. v. McDonald's Estate,* 108 Wis. 21, 83 N. W. 1107; *Tuley v. Barton,* 79 Va. 387; *White v. Merrell,* 32 Ill. 511. The contention that the receipt in question is like the one in the case of *Conant v. Kimball's Estate,* 95 Wis. 550, 70 N. W. 74, is not sustained. In that case the receipt for money was couched in language which, when applied to the surrounding facts and circumstances of the parties, showed it covered some agreement in addition to the fact of a payment of money, and therefore was treated as a written contract, and not open to explanation or contradiction by parol. See cases cited therein. The writing in the instant case must be held to be a mere receipt. In this view, it was competent for the parties to make an agreement to the effect that the boiler should remain in place for the purpose of giving appellant an opportunity to remedy any defects, and respondent to ascertain whether it would be satisfactory under the contract of purchase. *Johnson v. Pugh,* 110 Wis. 167, 85 N. W. 641.

Another exception urged is that the finding of the referee and court upon the subject of the contemporaneous agreement is contrary to the clear preponderance of the evidence, in that it fails to disclose any defect in the boiler at the time of the last payment, of December, 1895. An examination of the evidence convinces us that there is ample evidence sustaining these findings of the trial court. The record discloses that it was not seriously contested but that the boiler was defective. It shows appellant made repeated efforts, through a long period of time, after the last payment, to improve the grates in the boiler and substitute new ones. The evidence shows that the last payment was not to be deemed an acceptance of the boiler, and therefore justifies the finding of facts in this branch of the case.

By the Court.—The judgment is affirmed.

THE STATE EX REL. VANDENHOUTEN, Respondent, vs. VANHUSE and others, Appellants.

November 18—December 11, 1903.

Constitutional law: Local laws: Title of act: Legislative grant of corporate powers: Schools and school districts: Apportionment of school fund: Retrospective statutes: Necessary parties.

1. Ch. 160, Laws of 1903, entitled "An act to legalize the organization of joint school district No. 4, of the towns of R. and L. in K. county, and to legalize the subsequent acts and proceedings of the officers and voters of said district," and providing in the body of the act that the designated organization "is hereby in all things legalized," and its acts and those of its officers and electors are legalized, only embraces one subject, and that subject is sufficiently expressed in the title, within the calls of sec. 18, art. IV, Const., declaring that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.
2. Said act is not repugnant to subd. 7, sec. 31, art. IV, Const., prohibiting the legislature, by special or private law, to grant corporate powers or privileges, except to cities; nor to subd. 8, sec. 31, art. IV, Const., prohibiting the legislature from enacting any special or private laws for authorizing the apportionment of any part of the school fund.
3. Ch. 160, Laws of 1903, legalizing an attempted organization of a school district, was enacted during the pendency of an appeal from an order overruling a demurrer to a complaint demanding judgment that such school district had no existence, and is *held* to be a valid enactment, and that effect must be given to its retrospective provisions.
4. In an action to obtain judgment that a school district has no existence, and to exclude defendants from acting as school officers therein, the school district itself should be joined as a party defendant.

APPEAL from an order of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an appeal from an order overruling a demurrer to the complaint demanding judgment that the pretended Joint School District No. 4 of the towns of Red River and Luxem-

berg has no existence, and to exclude the defendants from acting as school officers therein. The complaint alleges, in effect: That the relator is a citizen of the United States, and a resident and taxpayer in the town of Luxemberg, in Kewaunee county, and school clerk of District No. 4 therein. That for more than ten years last past there existed Joint School District No. 2, of Red River and Green Bay, in the counties of Kewaunee and Brown; also district No. 1 of Red River, in Kewaunee county; also Joint District No. 1, of the towns of Red River, Luxemberg, Casco, and Lincoln, in Kewaunee county; also District No. 4 in Luxemberg; also Joint District No. 3 in the towns of Luxemberg and Casco; also District No. 7 in Luxemberg—all created under ch. 27, Stats. 1898. October 23, 1899, a petition was filed in the office of the clerk of Luxemberg for a joint school district from Luxemberg and Red River, and, pursuant to a call, a meeting of the supervisors of the towns of Casco, Lincoln, Luxemberg, and Red River, all in Kewaunee county, was held, and such application was by order denied, which order was duly signed and filed and entered of record, and no appeal therefrom has ever been taken, and no other petition therefor has ever been made. In the latter part of 1899, or the fore part of 1900, the defendants met at Red River or Luxemberg, and "without any authority of law, and without any proceedings under law, and with the intent to unlawfully usurp corporate existence, formed, or attempted to form, a pretended school district, and had then and there assumed to form an alleged school district, calling the same 'Joint School District No. 4 of the Towns of Luxemberg and Red River,'" in the territory therein described, from said Joint School District No. 2, School District No. 1, School District No. 4, School District No. 7, and Joint School District No. 1, and that the defendants made up a fund among themselves from their private means, and built a schoolhouse, and contributed money, in part, for the support of the school

therein, the payment of teachers, etc., and maintained or attempted to maintain a public school, and to exercise corporate powers of a school district, and constituted the defendants "the school board" of Joint School District No. 4, with a director, a treasurer, and a clerk; and they assumed powers as such, and drew and used what would have been their proportionate share of the public school moneys, had there been such a district, and prevented the relator from performing his duty as clerk of School District No. 4 in taking the census for 1902, and that the defendant Delebroux took the same, and that the defendants formed themselves into a corporation without being incorporated. That June 27, 1902, the Attorney General refused to bring suit for such misconduct, and thereupon the relator commenced this action.

For the appellants there was a brief by *O. H. Bruemmer,* attorney, and *Wigman, Martin & Martin,* of counsel, and oral argument by *P. H. Martin.*

For the respondent the cause was submitted on the brief of *John Wattawa.*

CASSODAY, C. J. 1. It is assumed, for the purpose of this appeal, that at the time of the commencement of this action "Joint School District No. 4 of the towns of Luxemberg and Red River," mentioned in the complaint, was not legally organized, and had no legal existence. Subsequently, and pending the appeal to this court, the legislature passed an act entitled "An act to legalize the organization of Joint School District No. 4, of the towns of Red River and Luxemberg, in Kewaunee county, and to legalize the subsequent acts and proceedings of the officers and voters of said district." Ch. 160, Laws of 1903. The first section of that act declares that "the organization of Joint School District No. 4 of the towns of Red River and Luxemberg, in Kewaunee county, comprising" the territory therein described, *"is hereby in all things legalized,"* which territory is the same

as alleged in the complaint to have been included by the defendants in their attempt to organize Joint School District No. 4 in the latter part of 1899, or fore part of 1900, except 120 acres, which appears to have been omitted. The second section of the act declares:

"All acts and proceedings of the said Joint School District No. 4, of the towns of Red River and Luxemberg, in Kewaunee county, and of the electors and officers thereof are hereby legalized to the same extent and effect as if said school district had been legally organized in the first instance."

The important question in the case is whether the act is valid and effectual according to its terms. There can be no question but that it is a "local bill," within the meaning of the section of the constitution which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." Sec. 18, art. IV. *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 131; *Wagner v. Milwaukee Co.* 112 Wis. 601, 88 N. W. 577; *Diana Shooting Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 880; *Verges v. Milwaukee Co.* 116 Wis. 191, 93 N. W. 44. Does the act "embrace more than one subject?" If not, is that subject "expressed in the title?" In the last two cases it was expressly held that "the constitution does not require the title of a private or local legislative act to go further than to express the subject covered by the body of the law. It leaves the method of expressing such subject to legislative discretion, within all reasonable boundaries. The statement of a primary purpose in general terms in a constitutional sense reasonably includes all the means designed to facilitate the accomplishment thereof." The act recognizes the organization of the district so formed in the latter part of 1899 or the fore part of 1900, and nearly all of the territory over which it assumed jurisdiction, and thereby expressly purported to legalize the same in all things, including "all acts and proceedings" of

such organization, "and of the electors and officers thereof . . . to the same extent and effect as if said school district had been legally organized in the first instance." We must hold that the act only embraces one subject, and that that subject is sufficiently expressed in the title. If the act is effective according to its terms, then it relates back to the inception of the organization, which was more than two years prior to the commencement of this action.

2. It is claimed that the act is in contravention of the provisions of the constitution which prohibit the legislature "from enacting any special or private laws . . . (7) for granting corporate powers or privileges, except to cities; (8) for authorizing the apportionment of any part of the school fund." Sec. 31, art. IV. It was held by this court more than twenty years ago that the subdivision of that section of the constitution as it then stood which prohibited "the enactment of any special or private law for *incorporating* any town or village by special charter or for the amendment of such charter" had "no reference to mere *quasi-corporations* like the towns which exist as political subdivisions of the state." *Cathcart v. Comstock,* 56 Wis. 590, 605–607, 14 N. W. 842. And it was there further held, in effect, that the creation of such towns brought them under general statutes which had previously provided that such organized towns should be a body corporate, with certain specified powers. So in a later case it was held that the division of existing towns and the creation of new towns by direct action of the legislature is not "the enacting of any special or private laws . . . for incorporating any town," within the meaning of the same clause of the constitution. *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 43 N. W. 551. Certainly there can be no more objection to the creation of school districts by direct action of the legislature than there is to the creation of towns in that way. Towns are thus held to be mere *quasi-corporations,* and certainly school districts can-

not be regarded as anything more. The general statutes provide for the formation of school districts and joint school districts, and the alteration thereof. Secs. 412–420. These statutes expressly declare that "a district lawfully organized is a body corporate and possesses the usual powers of a public corporation." Sec. 417. Stats. 1898. This applies to joint school districts as well as other districts. If the curative act in question had the effect to legalize the organization "to the same extent and effect as if said school district had been legally organized in the first instance," as therein expressed, then such district, when so organized, was thereby brought within the provisions of the general statute quoted, and, by virtue of such general statute, became a body corporate, and possessed of the usual powers of a public corporation. So all provisions of the general statutes applicable to such school districts became applicable to the new district so legally organized. The act in question did not attempt to grant "corporate powers or privileges," nor to apportion any part of the school fund, and hence it is not repugnant to the provisions of the constitution quoted.

3. It is contended that the act in question is void because it retroacts upon a past controversy, and is an attempt to reverse the decision of the trial court made in the exercise of undoubted authority. The past controversy thus referred to, as indicated by some of the decisions cited in support of the contention, relate to controversies which had terminated in judgment before the curative act. *Charles Baumback Co. v. Singer,* 86 Wis. 329, 56 N. W. 873. To that case may be added *Wis. Tel. Co. v. Krueger,* 115 Wis. 150, 153, 154, 90 N. W. 458, and numerous cases there cited. Others relate to curative acts interfering with vested rights, or imposing some new obligation. In the case at bar no judgment was ever entered. No vested rights are involved, and no new obligation is imposed. In the case of *Rood v. C., M. & St. P.*

R. Co. 43 Wis. 146, the plaintiff recovered judgment in the circuit court for three times the amount of excessive freight charges. The railway company appealed to this court. On the argument here, counsel for the plaintiff was confronted with an act of the legislature published a few days before repealing the statute upon which the judgment was based, and so it was held that no recovery could be had in that action. To the same effect, *Freiberg v. Singer,* 90 Wis. 608, 611, 63 N. W. 754; *Davison v. Brown,* 93 Wis. 85, 88, 67 N. W. 42. After the motion to dismiss the appeal had been denied by the Supreme Court of the United States, in the celebrated *McCardle Case,* 6 Wall. 318, 327, congress passed an act repealing the provisions of the act which authorized the appeal; and the court, among other things, held that "the repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal." *Ex parte McCardle,* 7 Wall. 506, 515. In a later case, after a suit had been commenced to restrain the construction of a bridge across the Mississippi river at Clinton, Iowa, as a nuisance, and after the pleas and replication had been filed and proofs taken, and the case was ready for hearing, congress passed an act declaring the bridge a "lawful structure," and it was held that the suit was thereby abated. *The Clinton Bridge,* 10 Wall. 454, 462, 463, following the celebrated *Wheeling Bridge Case,* 18 How. 439. See, also, *In re Hall,* 167 U. S. 38, 42, 17 Sup. Ct. 723. We must hold that ch. 160, Laws of 1903, is a valid enactment, and that effect must be given to its retroactive provisions.

4. This court has recently held:

"In *quo warranto* brought to oust the defendants from certain village offices, and to obtain judgment declaring the attempted incorporation of the village to be invalid, the village itself should have been joined as a party defendant." *State ex rel. Weinsheim v. Leischer,* 117 Wis. 475, 94 N. W. 299.

We must hold that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant, in failing to make Joint School District No. 4 a party.

By the Court.—The order of the circuit court is reversed, and the cause is remanded, with direction to sustain the demurrer to the complaint on the two grounds mentioned.

ALLARD, Respondent, vs. SMITH, Appellant.

November 18—December 11, 1903.

Appeals from justices' courts: Duty of appellant: Justices of the peace: Return on appeal, by whom made: Inherent powers of courts of record: Dismissal of appeal: Discretionary orders: Amendments.

1. It is the duty of the party appealing from a judgment rendered by a justice of the peace to see that a return to the appellate court is made; until this is done the appeal is imperfect and the appellate court has power only to compel a return or dismiss the appeal.
2. Defendant appealed from a judgment rendered by a justice of the peace, but before return was made the term of office of the justice before whom the judgment was rendered expired. His successor in office filed in the appellate court a certified copy of the docket entries in the case, but returned no papers, the same having been lost. *Held*, under the provisions of secs. 3764, 3765, Stats. 1898, that the copy of the docket filed constituted no return.
3. In such case, the appeal could not be dismissed under the provisions of sec. 3766, Stats. 1898, because no return had been made, but, under the facts stated in the opinion, and under the inherent power possessed by the circuit court to require the diligent prosecution of actions, no error was committed in dismissing the appeal.
4. Where, on an appeal from a judgment rendered by a justice of the peace, a motion to dismiss the *action* was orally granted, the circuit court has the power, at the same term and before the order of dismissal had been reduced to writing, to amend the motion and order so that they should provide for a dismissal of the *appeal*.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court of Fond du Lac county dismissing an appeal from a justice's court. It appears from the record: That *Allard* brought an action of unlawful detainer against *Smith* before one Bissell, a justice of the peace, and obtained judgment of restitution therein January 14, 1897. That the defendant filed a proper notice and undertaking upon appeal to the county court of Fond du Lac county upon the following day. That at the same time he tendered to the justice $7.50, which sum was intended to cover the various sums necessary to be paid upon appeal, to wit: $1, state tax; $1 for return; $2 for clerk's fees; and $3.50 for justice's fees. That the justice refused to accept the sum tendered, claiming that the justice's fees amounted to $5.50, and hence that the tender made was insufficient. That a few days later the defendant made a motion in the county court for an order compelling the justice to make a return, which motion was denied, and the order of denial was affirmed in this court on the ground that the time had not expired within which the return might be made. *Allard v. Smith,* 97 Wis. 534, 73 N. W. 50. That on July 16, 1898, Bissell's term of office having expired, his successor in office, Thomas Watson, filed a certified copy of the docket entries in the case in the county court, but returned no papers, the same having been lost. That on November 30, 1897, the defendant obtained an order requiring Bissell to show cause why he should not make return, but that this order was vacated before hearing, upon the defendant's own motion. That September 13, 1898, the plaintiff moved to dismiss the appeal for nonpayment of the justice's fees and failure to bring the case to trial for two terms, but that this motion was denied December 5, 1898, and the case stricken from the calendar for the term, and the defendant given leave to perfect the record before the January term of said court on penalty

of dismissal of the appeal if he did not do so, and the case was placed on said January calendar. That December 10, 1898, the plaintiff made and filed an affidavit of prejudice, but that no order of change was actually made until July, 1899. That in January, 1899, the defendant, assuming the change of venue to have been made, made a motion in the circuit court for an order compelling Bissell to make a return, which motion was denied in March, 1899, because the records were still in the county court. That November 14, 1899, the plaintiff moved the circuit court that the appeal be dismissed for failure to bring the action to trial, and for failure to perfect the appeal, which motion was denied April 14, 1900. That the case then rested without further proceedings until November 11, 1900, when the plaintiff moved to dismiss the *action,* which motion seems to have been orally granted, but, before the order of dismissal was reduced to writing, both the motion and order were, on plaintiff's motion, amended so as to make them a motion and order dismissing the *appeal.* Judgment of dismissal of the appeal in pursuance to this order was rendered, and the defendant appeals to this court.

For the appellant the cause was submitted on the brief of *Charles D. Smith.*

For the respondent there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

WINSLOW, J. That the appellant has been industrious in this case is undeniable, but his industry seems to have been largely misdirected. It was his duty to see that a return to the appellate court was made. Until that was done, the appeal was imperfect, and the court had power only to compel a return or dismiss the appeal. *Allard v. Smith,* 97 Wis. 534, 73 N. W. 50. The copy of the docket filed by Watson, the successor in office of Bissell, constituted no return, in

law. The statute does not authorize the successor in office to make a return, but provides specifically for a return (by compulsion if necessary) by the justice who tried the case, even if he shall have gone out of office, and, in case of his death, insanity, or removal from the state, provides for the ascertainment of the facts as to the trial below by the examination of witnesses, thus supplying the place of a return. Secs. 3764, 3765, Stats. 1898. The appellate court undoubtedly had power to require the appellant to cause the return to be made within a reasonable time, and, in case of failure so to do, to dismiss the appeal, in the exercise of a wise discretion. This could be done, not under the terms of sec. 3766, Stats. 1898, because no return had been made, and hence that section did not apply, but under the inherent power possessed by courts of record to require the diligent prosecution of actions by suitors, to the end that the records of the court may not be incumbered by dead or dormant litigation. 6 Enc. Pl. & Pr. 904. We think the discretion was wisely exercised in the present case. Nearly four years had elapsed since the appeal was taken. It is true that the appellant had made three motions to compel a return; the first being denied because made prematurely before a return was due, the second being withdrawn by the appellant himself, and the third being denied by the circuit court because the change of venue had not yet been perfected. After the change of venue was complete, however, nearly a year and a half elapsed before the dismissal of the appeal, during which time the appellant made no effort to procure a return, though he had been required by order of the county court made before the change of venue to perfect the record before the January term, 1899, of that court, on pain of dismissal of the appeal.

We have not found it necessary to discuss the question as to whether the tender of fees to the justice on the appeal was

sufficient. If it was sufficient, the duty still lay upon the appellant to take the proper proceedings to compel the making of a return under sec. 3764, *supra.*

The court undoubtedly had power at the same term to amend the motion papers and order so that they should provide for a dismissal of the *appeal,* instead of a dismissal of the *action.*

By the Court.—Judgment affirmed.

LOPER, Appellant, vs. ESTATE OF SHELDON, Respondent.

November 18—December 11, 1903.

Contracts for services: Ambiguity: Statute of frauds: Void contract as evidence: Presumptions: Limitation of actions.

1. Where the literal sense of the words of a contract shows no serious ambiguity, and may be taken either of two ways, one of which will render it void, and the other not, the latter is to be preferred.
2. Ambiguity requiring judicial construction may as well arise from applying the contract to the subject matter thereof as from the literal sense of the word.
3. In such case, in aid of determining the intention of the parties, the agreement may be considered from the precise standpoint, as regards surrounding circumstances, of the parties at the time of entering into the same, and the meaning which they subsequently, by their conduct, ascribe thereto.
4. Plaintiff alleged an oral contract whereby she was to remain and serve decedent and his wife faithfully as a daughter, during their lives, or until she should arive at the age of twenty-one years, or be married, and in consideration thereof she should be rewarded by maintenance and education during such time, and a provision out of decedent's property, such as he would bestow on an own faithful daughter. When the contract was made decedent's property consisted largely of real estate, and all parties had in view, in a general way, such or similar property. *Held,* that the agreement clearly contemplated that the property which was to be subject of bestowal upon plaintiff would be, in part, realty, and the contract was therefore within

the condemnation of sec. 2304, Stats. 1898, requiring all contracts for the sale of any lands or interests therein to be in writing.

5. In such case, while the contract cannot be used as the basis for computing the amount plaintiff is entitled to recover *quantum meruit*, it is effective to rebut the legal presumption that her services were gratuitously rendered.

6. In such case, plaintiff's right to recover being limited to a cause of action upon implied contract, such right matured and was enforceable the instant the services were completed, no demand was necessary to set the statute of limitations in motion and it began to run from that time.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Abbie Strong Loper, in the matter of the settlement of the estate of Robert Sheldon, deceased, in the county court of Fond du Lac county, filed a claim for $10,000, stating for facts in support thereof, that in May, 1877, she, then a child of eleven years, went to reside with the deceased and his wife, who had no children of their own, under a contract wherein it was stipulated that she should so remain and serve them faithfully as a daughter during their lives or until she should arrive at the age of twenty-one years or be married, and in consideration thereof that she should be rewarded by maintenance and education during such time, such as they would bestow upon an own daughter if they had such; and further by a provision out of Mr. Sheldon's property, such as he would bestow upon a faithful, affectionate daughter, to wit: the bulk of all the property he possessed, which, at the time of the making of the contract, was of the value of about $15,000; that she fully performed all the terms of such contract on her part, residing with the Sheldon family till September 5, 1888, when she was married; that Mr. Sheldon failed to perform the conditions of such contract on his part in that he did not maintain and educate the claimant as a daughter, and died without making any provision for her out of his property; that the reasonable value of the prop-

erty promised to her was, at the time of Mr. Sheldon's death, the sum of $10,000. The facts alleged in regard to the contract were put in issue in the county court by the executor of Sheldon's will, and the six-years statute of limitations was pleaded as a bar to the plaintiff's claim. Such proceedings were thereafter duly had in respect to the matter that the claim was allowed at the sum of $1,050.

The executor appealed to the circuit court, where a trial was had, the disputed matters of fact being submitted to a jury, resulting in a finding, first, that plaintiff resided with the deceased and his wife as alleged in her claim, under a contract substantially of the tenor and effect therein set forth; that the reasonable value of the deceased's estate at the time of his death was $20,000; that Sheldon breached such contract as stated in the plaintiff's claim; that the reasonable value of her services rendered under such contract, on the basis of the terms thereof, was $10,000; and that the reasonable value of such services independently of the contract, over and above the benefits she received from Mr. Sheldon while residing in his family, was $260. Upon such verdict plaintiff moved for judgment for $10,000, and defendant moved for judgment dismissing the plaintiff's claim with costs. The first motion was denied. The verdict was amended by withdrawing therefrom the element that plaintiff agreed to serve Sheldon and his wife during their lives, leaving the stipulation as regards residence with them, that it should continue till she arrived at the age of twenty-one years or should be married; the change being made upon the ground that there was no evidence to establish the element so withdrawn. The court held, upon the evidence and the verdict, that the contract was not void under sec. 2307, Stats. 1898, as being a verbal agreement which by its terms was not to be performed within one year; that it was a verbal agreement to convey realty by devise, and void under sec. 2304, Id.; that such being the case, the limit of the plaintiff's right in any event

would be to recover the reasonable value of her services over and above the benefits received by her upon an implied promise, which reasonable value was assessed by the jury at $260; that her right to recover upon such implied contract matured more than six years before Sheldon died, and was therefore barred by the six-years statute of limitations (sec. 4222, Stats. 1898). Judgment was rendered accordingly, and plaintiff appealed.

For the appellant there were briefs by *Carter & Pedrick*, and oral argument by *Geo. W. Carter* and *S. M. Pedrick*.

For the respondent there was a brief by *Reed & Reed*, attorneys, and *Swett & Ecke*, of counsel, and oral argument by *H. E. Swett* and *Roy Reed*.

MARSHALL, J. The view we take of this case renders two questions pressed upon our attention in the briefs of counsel immaterial to the final solution of the rights of the parties. They are these: (1) Did the court err in changing the verdict, eliminating the element as regards its having been agreed that appellant should reside with Mr. and Mrs. Sheldon during their lives? (2) Is the contract, as appellant claims it was made, void under the statute of frauds because not in writing and by its terms not to be performed within one year? For the reason given we will pass such questions without further notice.

The all-important question presented by appellant is, Did the trial court err in holding that the contract was one creating an obligation to convey real estate by devise? If such is the nature thereof, it is plainly void under sec. 2304, Stats. 1898, providing:

"Every contract . . . for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the . . . sale is to be made or by his lawfully authorized agent."

The call thereof, for a contract respecting realty to be in writing, is wanting in the one before us. Therefore, the vital question for us to solve is, does the contract here deal with realty? We must solve it by familiar rules for judicial construction. The literal sense of the words shows no serious ambiguity, it is true, and, if we were not permitted to go further, the rule would prevail that where words of a contract may be reasonably taken in either of two ways, one that will render it void and one that will not, the latter is to be preferred. *Hunt v. Stinson,* 101 Wis. 556, 77 N. W. 901. But ambiguity requiring judicial construction may as well arise from applying the contract to the subject-matter thereof as from the literal sense of the words. *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 163, 88 N. W. 41; *Johnson v. Pugh,* 110 Wis. 167, 170, 85 N. W. 641. In either case, in aid of determining the intention of the parties, which of course must govern if within the reasonable scope of their words, the agreement may be considered from the precise standpoint, as regards surrounding circumstances, of the parties at the time of entering into the same (*Johnson v. Pugh, supra*), and the meaning which they subsequently, by their conduct, ascribed thereto.

Turning to the evidence we find that it is undisputed that when the contract was made Sheldon's property consisted largely of real estate, and all parties concerned had in view, in a general way, such property: either the precise property then owned by Sheldon or similar property as regards being mixed realty and personalty. There is other evidence showing that, during the time appellant was performing under the contract, that which she was expected to have a share of was property which Sheldon then possessed, or property of like character. As Sheldon himself put it, the property left when "they got through with it." Probably the contract did not go so far as to so impress the property owned by him when the contract was made as to preclude his selling it or dealing

with it in any other way he might see fit, as owner, subject to the obligation that appellant should in the end have a share of all he possessed, whether real or personal. It is sufficient for the purposes of this case that the agreement clearly contemplated that the property which was to be the subject of bestowal upon her would be realty and personalty. That such was the case there seems to be little room to doubt. That being so, the question of whether the contract falls within the condemnation of sec. 2304, Stats. 1898, is ruled by *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252, and *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439.

The contract under consideration in each of the foregoing cited cases was in all essential particulars like the one before us. In each instance it was said that the agreement established was in part for a devise of land, and the same not being evidenced by any writing signed by the testator was therefore within the statute of frauds. "The fact that it included personal as well as real estate does not take it out of the statute, even as to such personal estate. Such a contract is indivisible, and, failing in part, the whole fails." In *Ellis v. Cary,* referred to and approved in the later case, the whole subject now presented will be found fully discussed. Therefore, there is no reason for going over it at this time.

The contract declared on, being void, cannot, as appellant's counsel seems to suppose, form the basis for computing the amount appellant is entitled to recover *quantum meruit.* Being void for one purpose it is void for all purposes, as regards forming the basis for a right measured in any sense by its terms. It can be legitimately referred to in a helpful way for appellant only to rebut the legal presumption that would otherwise control, that her services were gratuitously rendered, as is generally the case when such services are performed by one residing in the family of another and as a member thereof. For that purpose such contract is effective. Thus is permitted to arise the implied contract to

pay for the services rendered the reasonable value thereof under all the circumstances, such value, of course, to be determined the same as if the void contract never had existence. *Martin v. Estate of Martin, supra.* That was the view taken by the learned trial court in submitting to the jury the question to which they answered $260.

Since appellant's right to recover on the facts is limited to a cause of action upon implied contract, such right matured and was enforceable the instant the services were completed, and the six-years statute of limitations (sec. 4022, Stats. 1898) then commenced to run. Demand for payment was not necessary to set the statute in motion. As no services were rendered after September, 1888, which is much more than six years before the death of Mr. Sheldon, it will be seen that prior to such event appellant's right was extinguished by the statute, as held by the trial court. It follows that the judgment appealed from must be affirmed.

By the Court.—So ordered.

TAYLOR, Administrator, Appellant, vs. SEIL, Respondent.

November 18—December 11, 1903.

Negligence: Furnishing firearms to minor child: Liability of parent for negligence of child: Construction of statutes: "Pistol": "Revolver": "Toy firearm": Appeal and error: Instructions to jury: Failure to request: Waiver.

1. Defendant purchased a 22-caliber Stevens rifle for the use of his seventeen-year-old son Nicholas, who was accustomed to hunt, and was frequently accompanied by a seven-year-old brother, Jesse, who, on such occasions, usually carried the gun. Defendant knew of these facts but had given positive instructions that Jesse should never be allowed to have the rifle in his hands while loaded, and had no knowledge that such instructions were ever disobeyed. In an action to recover for the neg-

ligent killing of plaintiff's intestate, while the rifle was in the possession of Jesse, *held*, that it was not error to refuse to direct the jury to find defendant negligent, or refuse to set aside a verdict finding the contrary.

2. A 22-caliber Stevens rifle is not a pistol or revolver, within the calls of sec. 4397, Stats. 1898, prohibiting any dealer or other person from selling, loaning or giving any pistol or revolver to any minor.

3. A 22-caliber Stevens rifle, used for hunting and killing game, is not a toy pistol, toy revolver or toy firearm, within sec. 4397*a*, Stats. 1898, denouncing a punishment on the use or possession of such.

4. An appellant waives any mere omission to instruct the jury upon any given subject by failure to present, *in writing*, request for such instruction.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for damages resulting from the death of plaintiff's son by a shot from a gun claimed to have been held and discharged by the seven-year-old son of the defendant. The evidence tended to prove that the defendant purchased what is described as a Stevens 22-caliber rifle, shooting a powder and ball cartridge, for the use of his son Nicholas, about seventeen years old, who was described as severely crippled in his lower limbs, so that walking was very difficult; that Nicholas was accustomed to hunt with this rifle, and on frequent occasions was accompanied by his little brother, Jesse, who on such occasions usually carried the gun for him to and from the woods; that Nicholas was intelligent, skilful, and careful in the use of the weapon; that the defendant knew of the custom of Jesse to accompany Nicholas and to carry the gun, but had given positive instructions that he never be allowed to have it in his hands when it was loaded, and that Nicholas obeyed such instructions; and that, if he disobeyed them at any time, as to which testimony conflicted, such fact had never come to the defendant's knowledge. On April 6, 1902, the boys went hunting, and were joined by three sons of the plaintiff, including Irving, about six years old; all of

the boys going to a stream to catch minnows. Nicholas laid the gun on the ground, and went out onto a board across the stream with a net. None of the older boys were watching the two smaller ones until the discharge of the gun was heard, whereupon plaintiff's son Irving was discovered on his back, and was dead when they reached him, from a gunshot wound just below the eye. The evidence is in conflict as to whether the gun was in the hands of defendant's son Jesse, or lying on the ground. The jury, however, found that the discharge was caused by his want of ordinary care in handling it, and that the deceased boy was guilty of no contributory negligence. The jury further found that defendant knew of, and consented to, Jesse's carrying the gun for Nicholas, but not to his carrying or handling it when it was loaded, or to its use and discharge by him; also that the defendant was guilty of no want of ordinary care in so doing. After motion to set aside this verdict and for a new trial had been overruled, judgment for the defendant was entered, from which the plaintiff brings this appeal.

M. C. Mead, for the appellant.

For the respondent there was a brief by *Andrew Gilbertson,* attorney, and *Francis Williams,* of counsel, and oral argument by *Mr. Gilbertson.*

DODGE, J. 1. Appellant's principal contention is that the trial court ought to have found respondent's negligence established as matter of law, and either directed the jury to find him negligent, or set aside their finding to the contrary. The substance of the facts disclosed by the evidence is set forth in our statement of facts. We are not prepared to say that no reasonable mind could reach a conclusion of ordinary care therefrom. It certainly is not unusual among farmers that boys of seventeen are intrusted with firearms. Nor is it obvious negligence to intrust the carrying of an unloaded gun to a boy of six or seven. Further than this the conduct

of respondent did not go, at least according to evidence which the jury might have believed. We therefore cannot hold that the court should have taken from the jury the question of defendant's negligence, nor that it should have set aside their verdict thereon.

Counsel further urges, however, that respondent was guilty of negligence, in law, because his acts were prohibited by express statutes, namely, secs. 4397, 4397*a*, Stats. 1898. The first of these provides, so far as material to the discussion: "Any dealer or other person who shall sell, loan, or give any pistol or revolver to any minor shall be punished," etc. It suffices to point out that the gun in question was neither a pistol nor revolver, and therefore not within this criminal statute, entitled to strict construction. The latter section denounces punishment on use or possession of "any toy pistol, toy revolver, or toy firearm." We find no proof that the rifle in question was a toy. It is described as a 22-caliber Stevens rifle. It is shown to have been used for hunting and killing game, and to have been capable of killing a human being. With nothing else in the way of proof, we cannot think it established that this was a toy firearm, within the strict words of the statute.

2. Error is assigned because of omission to give to the jury any definition of the meaning, in law, of the expression "want of ordinary care," in submitting a question whether defendant was guilty thereof. No request, either written or oral, for any instruction defining this expression, was made. We have very recently reiterated the rule that an appellant waives any mere omission to instruct upon any subject by failure to present request for such instruction, and that in writing, and ordinarily will not be heard to assign error for such omission. Our recent review of that subject has been so complete that we need not go over it again. *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Schroeder v. W. C. R. Co.* 117 Wis. 33, 41, 93 N. W. 837; *Barton v. Bruley,*

119 Wis. 326, 96 N. W. 815; *Cupps v. State, post,* p. 504, 97 N. W. 210. Doubtless there are instances where this court has yielded the exact enforcement of this rule in order to correct what appeared very obviously to be the result of misapprehension and confusion of the jury, whether to the promotion of orderly procedure or of justice, in the long run, may be questionable. Certainly only in clear and extreme cases can that be warranted. The present record presents no reason to doubt that the jury understood the expression "want of ordinary care," and answered the question intelligently. Appellant cannot now be heard to assign error upon the failure of the trial court to do what he did not request be done.

Certain alleged errors in the instructions upon proximate cause and damages need not be considered, for the jury never reached either of those subjects.

We find no assignment of error which can be sustained.

By the Court.—Judgment affirmed.

DORNBROOK, Respondent, vs. M. RUMELY COMPANY and others, Appellants.

November 19—December 11, 1906.

Sales: Purchaser: Chattel mortgage: Filing: Priority: Fraudulent conveyances: Evidence: Collusion: Appeal: Harmless error: Questions reviewed.

1. Plaintiff's son placed with defendant an order for a threshing outfit which was accepted, plaintiff also signing the order. The order provided for giving notes and a chattel mortgage by the son, and for additional security by plaintiff's signing some of the notes. *Held,* that the fact that defendant accepted the son's individual notes and chattel mortgage indicated that it treated the son as the purchaser.

2. In such case, the son's mortgage was not filed in town clerk's office of the town where the son resided. Defendant did not take possession until after the son, for a valuable consideration, had mortgaged the outfit to the father, and the father had purchased the outfit on foreclosing his mortgage. The defendant, claiming under its chattel mortgage, took possession and plaintiff brought replevin. *Held*, that defendant's mortgage was void as against that of plaintiff, and it was immaterial whether plaintiff knew his son had given defendant a chattel mortgage, nor was it material to inquire whether he knew or ought to have known that the son fraudulently intended to hinder and delay his creditors in giving the chattel mortgage.
3. Plaintiff's son, in an order for a threshing outfit, incorrectly stated his residence to be in the town of M. This order was canceled, and a second order was taken in which the son correctly stated his residence as in the town of S. and this order was also signed by the plaintiff. Thereafter the son gave defendant a chattel mortgage on the outfit, stating his residence to be in the town of M., in which town defendant's chattel mortgage was filed. Plaintiff subsequently took a chattel mortgage on the same outfit, and in an action of replevin brought against defendant for the outfit the jury found that plaintiff, when he took his chattel mortgage, had no knowledge of defendant's mortgage, or that the son intended to hinder, delay or defraud his creditors, and that plaintiff did not collude with the son in foreclosing his mortgage. It also appeared that plaintiff had no knowledge of his son's misstatements as to residence. *Held*, that defendant's contention that plaintiff was guilty of collusion and fraud, which resulted in misleading it, and caused it to file its chattel mortgage in the town of M., was without foundation.
4. When, in view of the undisputed facts, a case is properly one for the court to direct a verdict, error in instructing the jury is harmless.
5. When no portion of the instructions to the jury appear in the bill of exceptions the supreme court will not review exceptions taken thereto on the trial.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On March 28, 1900, John L. Dornbrook gave a written order to the *M. Rumely Company* for a threshing outfit, consisting of a traction engine, grain separator, and all necessary machinery and attachments, at a price of $2,325. The

order was given at La Porte, Indiana. Under the order the machinery was to be shipped in the following month of June. It contained the conditions of payment, and required that notes for the unpaid purchase price were to be given as specified, and that payment thereof should be secured by a chattel mortgage on the property, to be executed by John L. Dornbrook, whose residence and post-office address were stated therein: "Postoffice, Brandon; Township, Metomen; County of Fond du Lac." In June John L. Dornbrook gave notice canceling the order to A. J. McCrary, agent for the *M. Rumely Company* at Fond du Lac. On the following day negotiations were resumed between A. J. McCrary and John L. Dornbrook for a sale of such a threshing outfit, resulting in a written order by John L. Dornbrook of July 9, 1900, in part reaffirming the former order, with some changes as to the parts of the outfit. This order contained provisions for giving notes for the purchase money and a chattel mortgage on the property by John L. Dornbrook, and provided for additional security as follows:

"*John Dornbrook* as security on first note, and notes amounting to $425.00 due January 1, 1901. As a condition hereof it is fully understood and agreed that title to the goods ordered hereby shall not pass until settlement is concluded and accepted by the *M. Rumely Company.*"

John Dornbrook, the plaintiff in this action, signed the order with his son, the purchaser of the property. After the signature of John L. Dornbrook appear the words: "Post office Brandon, Township Springvale, county Fond du Lac," with ditto marks under this address after the signature of plaintiff. The address appeared to be in the handwriting of A. J. McCrary. The property was delivered in July, and notes were taken for the purchase price, secured by a chattel mortgage on the property, which were signed by John L. Dornbrook stating his post-office address and residence as in

the order of March 28, 1900. This mortgage was executed July 17, 1900, and delivered to the agent of the *M. Rumely Company,* who caused it to be filed in the office of the town clerk of the town of Metomen. The chattel mortgage was never filed in the office of the town clerk of the town of Springvale. There is no dispute but that John L. Dornbrook resided in the town of Springvale at the time of all these transactions, and that the property covered by the mortgage was located in this town when the chattel mortgage was given. The plaintiff, *John Dornbrook,* had loaned money to and paid out as surety on notes he had signed with his son, and was liable as surety on outstanding obligations of the son amounting in all to $1,090, on February 6, 1902, when he took a chattel mortgage from John L. Dornbrook on this threshing outfit and engine to secure his indebtedness. This mortgage was filed with the town clerk of the town of Springvale on February 8, 1902. On July 5th plaintiff bid in the mortgaged property at a sale under foreclosure of his chattel mortgage. On July 25, 1902, the *M. Rumely Company* seized the property under its chattel mortgage, executed by John L. Dornbrook, removing it from plaintiff's possession, who replevied it in this action on the following 29th of July. Upon the trial the jury found as facts that plaintiff had no knowledge of the defendant's mortgage nor of John L. Dornbrook's intent to hinder, delay, and defraud his creditors, and that he did not collude with his son in the foreclosure of the mortgage and the sale of the property. The court gave judgment in plaintiff's favor, declaring plaintiff to be the owner of the property; and that the defendant company wrongfully took it from his possession, and unjustly detained it; that plaintiff has a right to retain it as owner, and that he recover damages in the sum of $1.93, with costs and disbursements. From this judgment the *M. Rumely Company* appeals.

For the appellants there was a brief by *John I. Thompson,* attorney, and *Maurice McKenna,* of counsel, and oral argument by *Mr. Thompson.*

For the respondent there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

SIEBECKER, J. The order of July 6, 1900, for the purchase of the threshing machine outfit by John L. Dornbrook from the *M. Rumely Company,* and the fact that the *M. Rumely Company* accepted his individual notes and chattel mortgage on the property sold, clearly indicate that it treated him as the purchaser. Under these facts and circumstances it was immaterial whether respondent knew his son had given appellant a chattel mortgage, nor was it material to inquire whether he knew or ought to have known that John L. Dornbrook fraudulently intended to hinder and delay his creditors in giving the chattel mortgage. The facts that respondent received his chattel mortgage to secure the payment of the sum of $1,090 actually due him from his son, and that this mortgage was filed with the town clerk of the town of Springvale, where the mortgagor resided, and where the property was actually located at the time, and the further facts that appellant omitted to file its mortgage with such town clerk, and had not taken possession of the chattels under it, left nothing further necessary as matters of fact upon which to determine the rights of the parties. This situation rendered appellant's mortgage void as against respondent's under secs. 2313 and 2314, Stats. 1898, which declare that "no mortgage of personal property shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee or unless the mortgage or a copy be filed" as provided in the last section. It is not asserted that the conditions of the statutes were complied with on the part of the

appellant, and its claim to any interest in this property under the mortgage was therefore without any foundation in law. The court properly awarded judgment that respondent is the owner and rightfully entitled to the possession of the chattels so wrongfully taken and detained by appellant. *The Ryan Drug Co. v. Hvambsahl,* 89 Wis. 61, 61 N. W. 299; *Parroski v. Goldberg,* 80 Wis. 339, 50 N. W. 191; *Blakeslee v. Rossman,* 43 Wis. 116; *Wagg-Anderson W. Co. v. Dunn,* 92 Wis. 409, 66 N. W. 354.

As appears in the above statement of facts, the jury found that respondent, when he took his chattel mortgage, had no knowledge that appellant had a chattel mortgage upon this property, nor that John L. Dornbrook intended to hinder, delay, and defraud his creditors, and that he did not collude with John L. Dornbrook in the foreclosure and sale of the property. It also appears that he had no knowledge of the misstatement made by John L. Dornbrook in the order of March 28, 1900, wherein he gave his residence as in the town of Metomen, instead of the town of Springvale, his actual residence. In view of this state of facts, the contention of appellant that respondent was guilty of collusion and fraud, which resulted in misleading it, and thereby causing it to file its chattel mortgage with the town clerk of the town of Metomen instead of the town of Springvale, the actual residence of John L. Dornbrook, is without foundation. The facts thus established leave no room for charging respondent with fraud in these transactions, and upon this ground no liability can be asserted against him.

Appellant urged some exceptions to the court's charge to the jury as prejudicial error. In view of the undisputed facts above referred to, the case was properly one for the court to direct a verdict in respondent's favor, and therefore any error in charging the jury would be harmless, but since no portion of the charge appears in the bill of exceptions, we

could not review any exception taken thereto on the trial were the case on appeal not disposed of as above indicated.

By the Court.—The judgment of the circuit court is affirmed.

SIMANEK, Respondent, vs. NEMETZ, Appellant.

November 19—December 11, 1903.

Appeal from justices' courts: Trial de novo: *Security for costs: Discretion: Deeds: Covenant of warranty: Breach: Landlord and tenant: Conversion of growing vegetables: Replevin: Parol evidence: Estoppel.*

1. Where an appeal from a justice's court gives the parties the right to a trial *de novo*, and the justice had ordered security for costs which was not given and the action dismissed for that reason, an application to the circuit court to require security for costs is addressed to the discretion of that court, and is not subject to review except where there has been an abuse thereof.
2. Plaintiff conveyed by warranty deed certain lands, part of which had theretofore been leased by parol for six months. The tenant entered into possession and during the term of his lease planted and cultivated therein vegetables. After the delivery of the deed, and before the expiration of this term, the tenant assigned to plaintiff his lease and interest in the growing vegetables. The grantee in the deed thereafter entered upon the demised premises and converted to his own use the vegetables so raised thereon. Plaintiff thereupon brought replevin for such vegetables. *Held*, that the warranty deed was not conclusive as against plaintiff's right to the vegetables growing upon the land at the time the deed was given.
3. In such case, parol evidence as to the purchase and sale of the real estate, and the conditions thereof, and the vegetables growing thereon, is admissible.
4. In such case, the tenant had an absolute right to the vegetables not only as against plaintiff, but as against the grantee, and had the right to sell and transfer the same to plaintiff.
5. Crops, such as vegetables, which require to be planted or sown annually are no part of the realty, and the mere sale of such growing crops operates to sever it from the realty so that they will no longer be included in a conveyance of the land.

6. Plaintiff having executed a valid lease of his realty, and put the tenant in possession, conveyed the land by warranty deed. The tenant cropped the demised premises with vegetables. Before the expiration of the term the tenant assigned to plaintiff his lease and his interest in the growing vegetables. *Held*, that the crop of vegetables was personal property, and that plaintiff was not estopped by the covenants of his deed from acquiring the title and possession of the vegetables, and holding the same as against his grantee.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was commenced in justice's court to recover $20 damages for the wrongful conversion on September 26, 1901, of certain vegetables raised on certain premises described. After the venue had been changed, the plaintiff was ordered to give security for costs. On his failure to do so the justice dismissed the case with costs, and entered judgment accordingly. Thereupon the plaintiff appealed therefrom to the circuit court. The defendant then renewed his motion to require the plaintiff to give security for costs, which was denied by the circuit court October 22, 1901, and in the same order the defendant, who was in default, was allowed to answer, and the defendant was ordered to pay to the plaintiff's attorney $10 costs of motion. The defendant then answered the complaint, and, in addition to a general denial, justified under a warranty deed with full covenants, and without reservation, from the plaintiff and wife to the defendant's son, executed and delivered June 26, 1901, of certain lands, including the land on which the vegetables were raised, and that in taking possession of the vegetables the defendant acted as the agent of his son, the grantee in such deed. The cause was thereupon refered to a referee to hear, try, and determine. A trial being had before the referee, he reported his findings of fact and conclusions of law August 26, 1902, to the effect that April 13, 1901, the plaintiff was the owner of the house and one acre of land described, and in considera-

tion of $20 rent, then paid to him, leased the house and the east half of the acre of land to one Skala for the term of six months, and that Skala took immediate possession; that June 26, 1901, the plaintiff and wife, by warranty deed, conveyed the whole of the acre to the defendant's son, who received such deed with full knowledge of Skala's lease and interest; that from April 13, 1901, to July 2, 1901, Skala planted, sowed, and cultivated the half acre of land and raised vegetables thereon, and then assigned to the plaintiff his lease and interest therein, and the plaintiff thereupon continued to cultivate the land until September 26, 1901, when the defendant, under authority from his son, entered upon the premises, and converted to his own use the vegetables so raised thereon, to the damage of the plaintiff in the sum of $20. October 20, 1902, the defendant moved the court to set aside all of the findings of the referee except as to the execution and delivery of the deed, which motion was denied by the court November 29, 1902, whereupon the referee's report was amended by finding that the plaintiff made due demand for the vegetables before the commencement of the suit; and the findings of the referee, so amended, were in all things confirmed by the court. From the judgment entered thereon the defendant brings this appeal.

The cause was submitted for the appellant on the briefs of *John Wattawa,* and for the respondent on that of *O. H. Bruemmer* and *George W. Wing.*

CASSODAY, C. J. 1. The appeal to the circuit court gave to the respective parties the right to a trial *de novo* in that court. That court was at liberty to require the plaintiff to give security for costs in case it was made to "appear reasonable and proper" for it to do so. Sec. 2942, Stats. 1898; *Dorothy v. Richmond,* 107 Wis. 652, 83 N. W. 768. But such application was addressed to the sound discretion of that court, and this court is not at liberty to interfere with such ruling,

except where there has been an abuse of such discretion. *Cullen v. Hanisch,* 114 Wis. 24, 29, 89 N. W. 900. We find no such abuse in the case at bar.

2. It is urged that the findings of the referee are not reviewable for want of exceptions, as prescribed by statute (secs. 2870, 2871, 2873, Stats. 1898). *Small v. Prentice,* 102 Wis. 256, 78 N. W. 415; *Momsen v. Atkins,* 105 Wis. 557, 563, 81 N. W. 647. Here no exceptions were filed until several months after the entry of judgment.

3. But the principal question involved is presented by the refusal of the referee and court to strike out all parol testimony as to the purchase and sale of the real estate, and the conditions thereof and the crops and vegetables growing thereon. The contention is that the deed from the plaintiff and wife to the defendant's son is conclusive against the plaintiff's right to any portion of the crops and vegetables growing upon the land at the time the deed was given. It is undisputed that the plaintiff had leased the house and the half acre of land upon which the crops and vegetables were grown to one Skala some two and one half months prior to the execution of the deed. That lease was by parol, and only for the term of six months. The statute expressly authorizes the making of a parol "lease for a term not exceeding one year." Sec. 2302, Stats. 1898. Skala paid the rent in advance, and immediately entered into the possession of the house and the half acre of land. There can be no question but that that lease was binding not only on Skala, but also upon the plaintiff. Had Skala remained in possession and continued to cultivate the land, there can be no doubt but that he could have held the crops as against the plaintiff or his grantee. Secs. 2194, 2195, Stats. 1898.

"The general rule of the common law is that growing crops form a part of the real estate to which they are attached, and from which they draw nourishment; and, unless there has been a constructive severance of them from the land, they

follow the title thereto. Thus, in the case of a voluntary conveyance of land they pass to the grantee, unless specially reserved by the grantor; or, in the case of a lease of the land the crops pass to the lessee unless expressly reserved." 8 Am. & Eng. Ency. of Law (2d ed.) 303, 304.

The reason for the rule is obvious. Ordinarily, the deed or lease of the land puts the grantee or lessee in possession, and any attempt on the part of the grantor or lessor to reenter and harvest the crops without permission would be a trespass. Skala's possession was of itself constructive notice to the grantee in the deed of his right to the crop as tenant. *Wickes v. Lake,* 25 Wis. 71; *Cunningham v. Brown,* 44 Wis. 72; *Coe v. Manseau,* 62 Wis. 81, 88, 22 N. W. 155; *First Nat. Bank v. Chafee,* 98 Wis. 42, 47, 73 N. W. 318. Besides, there is evidence tending to prove that he had actual notice of Skala's lease. Such evidence appears to be admissible. *Pringle v. Dunn,* 37 Wis. 449; *Brinkman v. Jones,* 44 Wis. 498; *Helms v. Chadbourne,* 45 Wis. 60; *Rowell v. Williams,* 54 Wis. 636, 12 N. W. 86. This court has recently held:

"Where the relation of landlord and tenant exists, even though the rent is to be paid in kind, the title to the crops is in the tenant until division is made, unless the contract specifically provides to the contrary." *Rowlands v. Voechting,* 115 Wis. 352, 91 N. W. 990.

It is unlike the case of a mere cropper, where the title to the crop remains in the owner of the land. *Kelly v. Rummerfield,* 117 Wis. 620, 94 N. W. 649. Neither is the question involved as to whether the defendant's son, as grantee in the deed, had any right to collect rent of Skala; since, as indicated, Skala paid the full amount of the rent in advance. See secs. 2194, 2195, Stats. 1898. Thus it appears that Skala had the absolute right to the crop, not only as against the plaintiff, but also as against the defendant's son, as such grantee, for several days after the execution and delivery of

the deed. As such owner, Skala had the right to sell and transfer the crops to whomsoever he pleased.

4. The only remaining question is whether the plaintiff, by reason of having given the warranty deed to the defendant's son, was estopped from taking an assignment or transfer of the crop and holding it as against the son as such grantee in the deed. The argument is that the outstanding lease in Skala was a breach of the covenants in the deed, and that when the plaintiff acquired title to the crop it inured to the benefit of his grantee, and that he cannot be allowed to set up title to the crops to defeat his own absolute grant. The fallacy in the argument consists in the assumption that the crop in question, as between the plaintiff and his grantee, was a part of the real estate. The general rule is that all crops which require to be planted or sown annually are "*fructus industriales,*" and "may be sold by parol as personal property," and "pass to the personal representative to be administered as personal property." 8 Am. & Eng. Ency. of Law (2d ed.) 302. Such crops are subject to seizure and sale on execution or attachment. Id. 308; *Whipple v. Foot,* 2 Johns. 418, 3 Am. Dec. 442; *Smith v. Tritt,* 18 N. C. (1 Dev. & B.) 241, 28 Am. Dec. 565; *Heard v. Fairbanks,* 5 Met. 111, 31 Am. Dec. 394; *Backenstoss v. Stahler's Adm'rs,* 33 Pa. St. 251, 75 Am. Dec. 592; *Flynt v. Conrad,* 93 Am. Dec. 588; *Willis v. Moore,* 59 Tex. 628, 46 Am. Rep. 284; *Polley v. Johnson,* 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; *Mabry v. Harp,* 53 Kan. 398, 36 Pac. 743; *Erickson v. Peterson,* 47 Minn. 525, 50 N. W. 699. Several of these cases, and many others which might be cited, support the proposition that parol evidence is admissible to show that at the time of conveying the land such crops were reserved or severed. There are adjudications the other way. The general rule is stated by Mr. Freeman thus:

"Crops, whether growing or standing in the field ready to be harvested are, when produced by annual cultivation, no

part of the realty. They are, therefore, liable to voluntary transfer as chattels. It is equally well settled that they may be seized and sold under execution."

Such propositions are supported by the citation of numerous adjudications. 1 Freeman, Executions (3d ed.) § 113, and 3 Freeman, Executions, § 349*b*. In this last section it is said, among other things, that "the mere sale of a growing crop operates to sever it from the realty, so that it will no longer be included in a voluntary or involuntary transfer of such realty." This court has often recognized the right to give a valid chattel mortgage upon such growing crops. *Comstock v. Scales,* 7 Wis. 159; *Lanyon v. Woodward,* 55 Wis. 652, 657, 13 N. W. 863; *Lamson v. Moffat,* 61 Wis. 153, 21 N. W. 62; *Merchants' & M. S. Bank v. Lovejoy,* 84 Wis. 601, 609, 55 N. W. 108. On the other hand, "those crops which grow from perennial roots, and which do not require the annual labor of the owner to bring them into existence, are called *fructus naturales,*" and pass to the heir at law or devisee as a part of the real estate. Id.; *Rogers v. Elliott,* 59 N. H. 201, 47 Am. Rep. 192; *Kirkeby v. Erickson* (Minn.) 96 N. W. 705; *Sparrow v. Pond,* 49 Minn 412, 52 N. W. 36. It is unnecessary to continue the discussion. We must hold that the crop in question was personal property, and that the plaintiff was not estopped by his deed from acquiring the title and possession to the same and holding the same as against his grantee, and the defendant acting under him.

By the Court.—The judgment of the circuit court is affirmed.

YOUNG, Respondent, vs. MURPHY and others, Appellants.

November 19—December 11, 1903.

Attorney and client: Purchase of client's property: Evidence: Burden of proof: Equity: Cancellation of instruments.

1. **In purchases by an attorney of his client's property, the transaction is always viewed with suspicion, and the attorney must prove the utmost good faith on his part or the transaction will be set aside by a court of equity.**
2. **Where an attorney purchased his client's real estate and thereafter mortgaged the same to one who had full knowledge of the client's equities therein, on the findings of the court, supported by the evidence, no error was committed in ordering the deed and mortgage to be canceled.**

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action in equity to cancel a deed and subsequent mortgage on certain real estate. The action was originally commenced against *Michael Murphy* and *Nora Murphy,* his wife, alone, but by an amended summons and complaint A. M. Lee and *Emma H. Marsh,* the brother-in-law and niece, respectively, of the defendant *Michael Murphy,* were brought into the action as defendants, and, Lee having died during the pendency of the action, the same was revived by bringing in Kate Lee, his widow, and administratrix of the estate, as a party. By the findings of the court it appears, in substance, that the plaintiff is an uneducated man, who can neither read nor write, and that the defendant *Michael Murphy* is a practicing lawyer; that on October 13, 1898, the defendant *Michael Murphy* sold and conveyed to the plaintiff an eighty-acre tract of land in Richland county for $1,000, of which purchase price $500 was paid by the transfer to the defendant of eighty acres of land in Juneau county, and the remaining $500 was secured by the plaintiff's notes and a mortgage upon the land sold; that on the 24th of October, 1898,

Michael Murphy assigned the $500 mortgage to said A. M. Lee, and that *Murphy* was at that time the agent of Lee in loaning and collecting money, and remained such until Lee's death at some time in 1902; that plaintiff paid in various ways $150.60 of said notes and mortgage prior to October 1, 1901; that Lee commenced foreclosure of said mortgage December 18, 1901, *Murphy* acting as his attorney, and continuing to act as such in said action after the death of Lee, and after the revival thereof in the name of Kate Lee as administratrix; that in May, 1899, the plaintiff consulted with the defendant *Michael Murphy* as an attorney, concerning a note held by one James, of Richland Center, which the plaintiff had signed as security, and said *Murphy* then represented to the plaintiff that James was about to commence a suit on said note, and that he (*Murphy*) did not purpose to have any judgment liens upon the land which he had sold to the plaintiff, and advised the plaintiff to make a deed of said land to his wife, *Nora Murphy,* agreeing that he would not deliver it, but would simply have it recorded, and hold it subject to the control of the plaintiff, and obtain a quitclaim deed from said *Nora Murphy* to the plaintiff whenever it was demanded; that the plaintiff was unable to pay the said James note, and, believing and relying on *Murphy's* representation, he executed a deed of said land to *Nora Murphy,* and left the same in the possession of *Michael Murphy;* that *Nora Murphy* was not present at the time of the making of said deed, and knew nothing about it, and paid nothing for said deed, and that *Michael Murphy* paid nothing for said deed, and that the same was never delivered to *Nora Murphy,* and no consideration was paid by any one therefor; that none of the notes secured by said $500 mortgage were ever returned to the plaintiff; that plaintiff has continuously occupied said land and paid the taxes thereon since he purchased the same in October, 1898, and that the same was and still is of the value of $1,000; that plaintiff has demanded a reconvey-

ance of said land, and that the defendant *Nora Murphy* refuses to reconvey the same; that on the 4th day of February, 1901, the defendant *Michael Murphy* gave his note to the defendant *Emma H. Marsh* for $366, and thereafter said defendant *Michael Murphy* and *Nora Murphy,* his wife, executed a mortgage upon said eighty acres of land to secure said note, but that the said *Emma H. Marsh* had full knowledge of the equities of the plaintiff in the said land when said mortgage was given, and is not a *bona fide* mortgagee in good faith thereof. On these findings the court concluded that the said deed from the plaintiff to *Nora Murphy* and the mortgage to *Emma H. Marsh* should be canceled and set aside, and from judgment in accordance with these conclusions the defendants *Michael* and *Nora Murphy* and *Emma H. Marsh* appeal.

The cause was submitted for the appellants on the brief of *Michael Murphy,* and for the respondent on that of *W. S. McCorkle.*

WINSLOW, J. While the defendant *Michael Murphy* denied that he was acting as attorney for the plaintiff when he received the deed of the land in dispute, and also claimed that there was a sufficient consideration for the transfer, we find that there was ample evidence in the record to sustain the findings of the trial court. Whatever might be the proper view of the transaction had it occurred between parties dealing at arm's length, where no relations of trust or confidence exist, the law is well settled that no such transaction as the one found by the court can be sustained where it takes place between an attorney and his client. Attorneys are ministers of justice as well as courts, and justice will not be contented with half-hearted service on the part of her ministers, nor will she tolerate a bargain counter within her temple. If an attorney purchase his client's property, concerning which his advice is sought, the transaction is always viewed with sus-

picion, and the attorney assumes the heavy burden of proving not only that there was no overreaching of the client, but that the client acted upon the fullest information and advice as to his rights. In other words, the attorney must prove *uberrima fides,* or the transaction will be set aside by a court of equity. These principles are so well established as to need no citation of authorities, and to the credit of the profession, be it said, it is rarely necessary to invoke them. Upon the facts found the trial court pursued the only course open to a court of equity.

By the Court.—Judgment affirmed.

HALVORSEN and wife, Respondents, vs. HALVORSEN and another, Appellants.

November 19—December 11, 1903.

Equity: Cause of action: Vendor's lien: Consideration: Parol evidence.

1. An action in equity to enforce the equitable right to a lien for unpaid purchase money on realty conveyed in consideration of support and maintenance of the grantors in old age, is not a suit to enforce a parol trust in land, nor is it an action for a forfeiture of the title for breach of condition subsequent.
2. The true consideration for a conveyance of land can always be inquired into by parol.
3. A vendor of realty has an equitable right to have the unpaid consideration therefor, by the action of a court of equity, made a lien thereon, and to have the use of its jurisdiction to enforce the same as justice may require.
4. The equitable right to a vendor's lien is not an interest in land in advance of the judgment of the court creating it. It is a right merely to demand the use of equity jurisdiction to enable the vendor to acquire an interest.

APPEAL from an order of the circuit court for Crawford county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Action to acquire and enforce a lien on realty. The facts set forth for a cause of action are these: In 1885 plaintiffs, who were husband and wife, being possessed of a farm of 200 acres particularly described, and its belongings, the accumulations of a life of industry, and being too old and infirm to longer work such farm as they customarily had, made a conveyance thereof to their son Gilbert, one half of the property to be his in consideration of services rendered, and one half of the homestead land and one half of the personal property to be held by him in trust to convey the same to such person as they might thereafter direct, for their support and maintenance in their old age. July 9, 1889, Gilbert executed the trust by conveying the trust property to his brother Edward, the sole consideration being that the latter should support and maintain plaintiffs on the farm and in the house thereon during the rest of their lives. Edward took possession of the property so conveyed, and carried out his agreement in respect to the maintenance of the old people, till September 21, 1900. On that day, pursuant to an agreement between himself, the plaintiffs and his brother George, and the wife of the latter, the defendant *Lorine,* to the effect that George should take the property conveyed to Edward as aforesaid and assume all his obligations in regard to the maintenance of the plaintiffs, a conveyance was so made to George, taking title not only to all the property conveyed to Edward as aforesaid, but also to all his additions made by the latter thereto, and the growing crops on the farm, rendering no consideration therefor in addition to assuming the obligation to maintain the plaintiffs as aforesaid, except the sum of $700, which was raised by mortgage upon the property and paid to Edward on account of such growing crops and additions. George and his wife faithfully carried out their contract in regard to plaintiffs till George died, in September, 1901. He left surviving him his said wife and a minor daughter, the defendant *Laura.* Shortly after his death his widow

compelled the plaintiffs to leave the old home, since which time she has prevented them from returning thereto and has wholly neglected and refused to carry out the aforesaid contract. The $700 mortgage against the property is wholly unpaid. The prayer for relief is that the amount necessary to support plaintiffs during the remainder of their days be ascertained and adjudged to be a lien upon the land involved prior to any claim of the defendants, and that such lien be enforced by a sale of the property, the proceeds of the sale, so far as necessary, to discharge such lien and the costs of the litigation, to be devoted thereto, and the money belonging to plaintiffs to be paid to them or devoted to their support and maintenance under the direction of the court. Defendants demurred to the complaint for insufficiency. The demurrer was overruled and defendants appealed.

For the appellants there were briefs by *Skaar & Bosshard,* and oral argument by *Otto Bosshard.*

For the respondents the cause was submitted on the brief of *O. B. Thomas.*

MARSHALL, J. This is not a suit to enforce a parol trust in lands, as appellants' counsel seem to suppose; hence the argument that the agreement under which Gilbert took title to the property in question, or the agreement under which George took and held the same at the time of his death, is void under sec. 2302, Stats. 1898, does not need attention. Neither is it an action for a forfeiture of the title to realty for breach of condition subsequent under the rule which controlled in *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118, which rule counsel on both sides seem to think must be considered. Therefore we need not spend time discussing the question of whether the complaint states a cause of action thereunder. It is an action in equity to enforce the equitable right to a lien upon the land in controversy for the unpaid purchase price thereof. That is plain.

The only trust, strictly speaking, that plaintiffs show was created or attempted to be created, was involved in the conveyance of the property by plaintiffs to their son Gilbert. That was fully executed when he conveyed the property to his brother Edward. That took the matter out of the statutes of frauds, as they deal only with executory contracts. When the latter conveyance was made, and when the conveyance was made by Edward to his brother George, the consideration agreed upon was no different in legal effect than it would have been had the agreement been to pay for the land in money at some future time. The only element of trust in the transaction was the fact that plaintiffs trusted their children to pay for the property according to contract,—the element of trust that is involved in any ordinary transaction where one sells property to another, trusting him, without security to pay therefor at a future time.

From the preceding it will be seen that we must answer these questions: First, may a person prove by parol the consideration for a conveyance of realty and establish a legal obligation to pay the same? Second, has a vendor of realty an equitable right to have the unpaid consideration therefor, by the action of a court of equity, made a lien thereon, and to have the use of its jurisdiction to enforce the same as justice may require? Both of such propositions need hardly more than be stated as a basis for the decision of the ultimate question here presented. Both are ruled in respondents' favor by numerous decisions of this court, and by elementary principles.

The true consideration for a conveyance of land can always be inquired into by parol. For examples: A deed absolute in form may be shown to have been given in fact to secure the payment of a debt and to be a mortgage (*McCormick v. Herndon,* 86 Wis. 449, 56 N. W. 1097). Any agreement made prior to or contemporaneous with the conveyance of land and in respect thereto, not involving the ordinary

covenants of title, may be shown by parol. (*Hahn v. Doolittle,* 18 Wis. 196; *Green v. Batson,* 71 Wis. 54, 36 N. W. 849.) Where land is conveyed, the deed containing language to the effect that the property is free and clear of all incumbrances except a certain mortgage indebtedness, specifying the amount thereof, no mention being made in the instrument or any other writing that the vendee agreed to pay off such indebtedness as part of the purchase price of the property, such an agreement may be shown by parol and enforced by the person for whose benefit it was made. *Perkins v. McAuliffe,* 105 Wis. 582, 587, 81 N. W. 645. In the latter case many adjudications are referred to, holding that the consideration of a conveyance of land may be established by parol and the rights of the parties protected accordingly, when the verbal agreement will not be inconsistent with the consideration expressed in the deed, though such expressed consideration and the verbal agreement may differ.

On the second question this court has spoken in the affirmative in many instances. *Tobey v. McAllister,* 9 Wis. 463; *Wickman v. Robinson,* 14 Wis. 493; *Crowe v. Colbeth,* 63 Wis. 643, 24 N. W. 478; *Berger v. Berger,* 104 Wis. 282, 80 N. W. 585. In *Crowe v. Colbeth* both of our propositions were involved. It was held that though a deed acknowledge full payment, it is competent for the vendor to show by parol that payment was only partial, that there was an agreement to make a further payment in the future, and to enforce such agreement by means of equity jurisdiction to acquire a lien upon the property and foreclose the same.

The idea advanced by counsel, that the effect of this suit, if maintainable, is to recognize the creation by plaintiffs and their sons Edward and George of an interest in land in plaintiffs' favor, or a reservation of such an interest, by parol, was fully met in *Berger v. Berger.* The equitable right to a vendor's lien is not an interest in land at all. It is a right merely to demand the use of equity jurisdiction to enable the

vendor to acquire an interest. There is no interest in the land in such a case, possessed by the vendor, in advance of the judgment of the court creating it. Thus, the court creates the lien, so to speak, not the parties to the conveyance of the land. The rule was thus stated in *Berger v. Berger:*

"The conveyance of land by deed passes the entire title, legal and equitable, to the vendee, subject to the vendor's equitable right to resort to it to collect unpaid purchase money, saving, however, the rights of innocent third persons. Except as otherwise provided by statute, and saving the rights of innocent interveners for value, the vendor may demand the exercise of the power of a court of equity to lay hold of the property and subject it to the payment of the purchase-money claim."

There is no other question, suggested by counsel for either party, that need be mentioned. The complaint states a good cause of action in equity to obtain a vendor's lien upon the land involved; hence the demurrer was properly overruled.

By the Court.—The order is affirmed.

MYRICK, Appellant, vs. KAHLE and wife, Respondents.

November 19—December 11, 1903.

Deeds: Covenants of warranty: After acquired title of grantor: Tax titles: Posting notices of tax sale: "Public places": Affidavit of posting: Insufficiency: Amendment of affidavit: Evidence.

1. E., the holder of certain tax deeds and certificates, conveyed to M., the holder of the original title, such deed containing the following grant: "To have and to hold the aforesaid premises . . . unto the said M., heirs and assigns, and to his and their sole use forever so that neither I, the said E., nor my heirs nor any person or persons claiming by, through or under us, or them shall at any time hereafter by any way or means have, claim or demand any right, title, interest or estate by, in or to any part or parcel thereof, forever." E. afterwards obtained a tax deed under a tax certificate he held at the time of such conveyance. *Held*, that such interest as E. acquired under such tax deed inured to M. under E.'s deed.

2. M., the holder of the original title to certain lands, had acquired the interest therein of E., the holder of certain tax titles, by a conveyance containing covenants of warranty. E. afterwards obtained other tax titles which inured to the benefit of M. under such covenants. *Held*, that such facts established sufficient title in M. to enable him to maintain an action to set aside tax deeds held by third parties.
3. Sec. 1130, Stats. 1898, requires that the county treasurer, before any tax sale, post up notices thereof in at least four *public places* in his county, and sec. 1132 provides for proof thereof, by affidavit, to be preserved and filed in the office of the county clerk. An affidavit made by such an officer omitted to state in what county such posting was done, but stated that notices were posted "in a conspicuous place" at the corner at the intersection of designated streets of a city, naming five such corners. *Held:*

   (1) That the affidavit was defective in omitting to state in what county such posting was had.

   (2) That *a conspicuous place* at a street corner is not necessarily a *public place* within the calls of the statute.

   (3) That the irregularities and omissions in the affidavit rendered the sale and tax deed issued thereon void.
4. In such case, after the record had been made up and filed, the county treasurer cannot amend the affidavit for the purpose of showing compliance with the statute in the posting of notices, and it is error to receive such amended affidavit in evidence.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Appellant was the original patentee of a body of land which included the lots in controversy. The patent was issued November 1, 1849, and recorded May 25, 1859. From the time of the issuance of the patent, and until 1858, the land was platted, the plat recorded, and there were various transfers of undivided parts of the land and some transfers of particular parts. In some of the deeds there were reservations which were not in others, and some of the descriptions of the lines were faulty and indefinite. This involved state of the title resulting from these descriptions was remedied by the decree of court in a partition suit rendered on November 22, 1858. The land was then allotted among the various

owners, and among the lots received by appellant were the lots in controversy. Thereafter several tax certificates and tax deeds were issued on these lots to B. E. Edwards before 1885. On August 24, 1885, Edwards and his wife, then the holder of tax deeds to certain of these lots and of a tax certificate upon lots 21 and 22 in block 4, deeded their interest to appellant. The following was a provision of the deed:

"To have and to hold the aforesaid premises with all the privileges and appurtenances thereunto belonging or in any way appertaining unto the said *Nathan Myrick,* heirs and assigns, and to his and their sole use forever so that neither I the said B. E. Edwards nor my heirs nor any person or persons claiming by through or under us or them shall at any time hereafter by any way or means have claim or demand any right, title, interest or estate by in or to the aforesaid premises or appurtenances or to any part or parcel thereof, forever."

In 1891 Edwards obtained a tax deed to lots 21 and 22, block 4, on the tax certificate issued in 1885, which he held when he made the deed. May 28, 1898, a tax deed was issued to Charles E. Servis of all the lots in dispute. Servis conveyed to Charles Smith, Jr., by whom the lots were conveyed to respondent *John H. Kahle,* who, with co-respondents, claims under this tax deed. The affidavit of the city treasurer of the posting of the notice of sale upon which this deed was issued is dated April 22, 1895, and does not state that the notices were posted in the county and city of La Crosse, and it also fails to state that the places of posting were "public places." [1] The affidavit states:

"Said notices were posted in a conspicuous place on the following places, to-wit: One in the office of city clerk; one

[1] Under the then charter of La Crosse (sec. 18, subch. VII, ch. 135, Laws of 1875), the proceedings on tax sales were conducted by the city treasurer, and records preserved in the office of the city clerk, in the same manner as prescribed by the general laws of the state, instead of by the county officers.—REP.

in the office of city treasurer; one on the southeast corner of Fourth and Jay streets; one on the southwest corner of Fifth and Market streets; one on the southwest corner of West avenue and Pine street; one on the southwest corner of George and Rublee streets; one on the southeast corner of Car and Mill streets."

The treasurer, after his term of office had expired, made a new affidavit, in which these omissions were supplied. This affidavit was made on the 7th day of May, 1901, and was filed on the day before the trial of this action. The judgment of the lower court was in defendants' favor, upholding the validity of the tax deed. From that judgment this appeal is taken.

For the appellant there was a brief by *Winter & Esch,* and oral argument by *Frank Winter.*

For the respondents there was a brief by *Higbee & Bunge,* and oral argument by *George Bunge.*

SIEBECKER, J. Respondents urge that appellant has failed to show sufficient grounds upon the record to entitle him to prosecute this action. It is not suggested in what respect appellant's record title to the property in question fails, aside from respondents' tax title, unless it be in the description in the conveyances offered in evidence, as being so indefinite that it could not be ascertained whether the lots to which respondents claim title in this action are included. The lots described in the complaint were set off to appellant by judgment of court in a partition suit between him and the other owners November 27, 1858. Whatever interest he lost thereafter by tax sales and other conveyances was reconveyed to him by deed from Edwards and wife August 24, 1885. Such interest as Edwards may have acquired by the tax deed of 1891, on the tax sale of May, 1885, inured to the benefit of appellant under the covenant in the deed of August, 1885. This establishes sufficient title in appellant to maintain this action.

The question, then, arises, is the tax deed upon which respondents rely for their title valid? Sec. 1130, Stats. 1898, requires that the county treasurer shall at least four weeks previous to the day of sale cause to be posted up copies of a notice of sale and statement of the lands upon which taxes have been returned as delinquent and remaining unpaid "in at least four public places in such county, one of which shall be posted up in some conspicuous place in his office." Proof of such posting is required (sec. 1132, Id.) to be made by affidavit, which affidavit, together with the affidavit of publication of such notice, shall be preserved by him, and deposited in the office of the county clerk, who shall file and preserve them (sec. 1141, Id.). The object of these provisions is to preserve the evidence of these facts for the benefit and protection of interested parties. The affidavit of posting notices for the tax sales in 1885 upon which respondents' deed is predicated does not state that they were posted in either the county or city of La Crosse, and describes the places where such notices were in fact posted as "in a conspicuous place," naming the offices of the treasurer and clerk of the city, and "one on the front door of St. Cloud Engine House," "one on the southeast corner of Fourth and Jay streets," and five others, one each on the corner of two streets designated by name and located as in the last above description. The provision of the statute requiring an affidavit of the county treasurer showing that such notices were posted in at least "four public places" in the county is not fulfilled by making and filing an affidavit which omits to state in what county such posting was had. This point was determined in *Ramsay v. Hommel,* 68 Wis. 12, 31 N. W. 271, wherein it was ruled that such an affidavit, specifying the places as "four public places in the village of Neillsville," is not a showing that the posting was in four public places in the county, under sec. 1130, Stats. 1898. See, also, *Morrow v. Lander,* 77 Wis. 77, 45 N. W. 956. The affidavit of posting recites that the sev-

eral copies of notices "were posted in a conspicuous place" at the designated locations, but does not describe them as "public places." Are the places described in their nature public places within the meaning of the law as defined in *Hart v. Smith,* 44 Wis. 213, and subsequent cases? What is a public place within the meaning of the statute as indicated in these decisions, resolves itself into a question partly of law and partly of fact. We must therefore look to the places designated and described to answer it. The place of posting should be one accessible to persons as a public, and applied to such uses and purposes where the public resorts, and thereby make them open to public observation. The obvious intention of the statute being to give publicity of the time, place, and lands to be sold, and thereby induce persons to attend the sale. It seems clear that street corners are not necessarily "public places" within the requirement of the law. It is a matter of common knowledge that conspicuous places at many street corners in cities are comparatively obscure and secret places, and to post a notice of tax sale in a conspicuous place at such corners would most likely fail to attract observation and meet the public view. These irregularities and omissions in the affidavit offered in evidence render the sale and tax deed issued thereon ineffectual and void.

An affidavit of the former city treasurer, made on the day before the trial of this action, for the purpose of complying with the statute in making proof of posting notices, was improperly received in evidence. Such an amendment of the proceedings after the records are filed with the city clerk might affect substantial rights of both the purchaser and the former owner, who relied on it. The affidavit takes the place of a record, which any person may examine, and therefrom ascertain whether the requirements of the statutes have been complied with. To permit an amendment after the record is made up and filed would defeat the objects of the statutes.

Iverslie v. Spaulding, 32 Wis. 394; *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

DAVIS, Respondent, vs. DREGNE and another, Appellants.

November 19—December 11, 1903.

Master and servant: Personal injuries: Negligence: Improper remarks by court: Court and jury: Instructions to jury: Appeal and error: Exceptions: Material error.

1. In an action for personal injuries against a father and his son, for negligence of the son, alleged to be the servant of the father, the court in denying a motion for a non-suit, and in the presence of the jury, made remarks from which the jury and bystanders would naturally infer that, in the opinion of the court, the testimony of defendants was unworthy of credit, and that no one in the court room would believe them. The court at the time, and later in the instructions to the jury, cautioned the jury not to be influenced by such remarks, as they were intended merely for counsel, and not for the jury. *Held*, that while such remarks were objectionable, they would not work a reversal for want of exception thereto.
2. In such case, the court in its instruction to the jury on the question as to whether plaintiff had used ordinary care, used language from which the jury might infer that, in the opinion of the court, the plaintiff had done everything that the law required him to do, and that his statement as to what he did was a verity in the case, and must be accepted as true by the jury. *Held*, when considered in connection with the court's remarks on the motion for a nonsuit, that the court invaded the province of the jury, and thereby defendants were prejudiced.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by the plaintiff by reason of being struck by a team

belonging to the defendant *John S. Dregne,* and being driven by his son, the defendant *Sylvester Dregne,* at a street crossing in Viroqua about seven o'clock on the evening of February 22, 1902. Issue being joined and trial had, the jury, at the close thereof, returned a special verdict to the effect (1) that the defendant *Sylvester* was the servant of the defendant *John S.* on February 22, 1902; (2) that the defendant *Sylvester* was acting within the scope of his employment while engaged in driving the team at the time he collided with the plaintiff on the crossing on the evening of February 22, 1902; (3) that the defendant *Sylvester* was wanting in ordinary care in driving and managing the team immediately prior to and at the time he collided with the plaintiff on the crossing; (4) that such want of ordinary care in driving and managing the team was the proximate cause of the plaintiff's injury; (5) that the plaintiff was using ordinary care in attempting to pass over the crossing at the time of the accident; (6) that they assessed the plaintiff's damages at $900. From the judgment entered thereon accordingly for the amount stated, the defendants bring this appeal.

For the appellants there was a brief by *C. W. Graves* and *C. M. Butt, Jr.,* and oral argument by *Mr. Graves.*

Silbaugh & Bennett, for the respondent.

CASSODAY, C. J. 1. It is claimed that the evidence is insufficient to support the findings of the jury to the effect that the defendant *Sylvester* was the servant of his father at the time of the injury, and that he was acting at the time within the scope of his employment, and hence that a nonsuit should have been granted in favor of the defendant *John S. Dregne.* The evidence in support of such findings is mostly circumstantial. *Sylvester* was twenty-two years of age at the time, unmarried, and lived at his father's house, and voluntarily did some work about the farm, but received no wages, and was engaged in raising tobacco on shares on his father's farm.

We cannot say that such findings of the jury are unsupported by the evidence, when considered in the most favorable light it will legitimately bear in favor of the plaintiff. *Renne v. U. S. Leather Co.* 107 Wis. 320, 83 N. W. 473. As there must be a new trial, we refrain from discussing the evidence bearing upon the questions suggested, or the inferences to be drawn from such evidence.

2. It is claimed that, in denying the motion for a nonsuit, the trial judge made remarks in the presence of the jury which were prejudicial to the defendants. Such remarks cover nearly two pages of the printed case. We quote some of them:

"It is true, the boy says he drove the team; but the presumption would be, in the absence of any evidence to the contrary, that he was acting there for his father. So the court will let the jury say, under all this evidence, whether they would believe the boy's statement and his father's—taking their manner on the stand—and let them pass upon it. . . . *Every one* would naturally look at it in a common sense view—that the boy came along with his father, driving the team; that he acted as the servant and agent of his father. *There is not a man in the courtroom* who has heard the boy's testimony but would think for a moment that the boy brought the father to town. They would say that the boy came along with his father. . . . Take the boy's statement. He says he borrowed the team on this occasion. The father and son came here together; and, as I say, take these facts altogether—the fact that he lived there at home, and had driven out before with his father and other members of the family—the presumption would be, from these statements, that he acted for his father. . . . So, taking this transaction and these statements of their coming here, the court is going to let the jury say, under all this evidence, whether they would believe this boy's statement, and his father's, taking their manner of testifying on the stand. Defendants' Counsel: Doesn't the court believe there was a bailment of this team? Court: You have asked me the question, and I will say that, from the manner of these parties on the stand, the court does not believe it. It may be so."

The only portion of such remarks excepted to is the answer to the direct question put to the court by counsel for the defendants. As soon as such exception was taken, the court cautioned the jury not to be influenced by such remarks, as they were intended merely for counsel, and not for the jury. Such caution was reiterated in the general charge. Such remarks of the court were undoubtedly made without considering the effect they would naturally have upon the jury. And yet it is very obvious that such remarks must have deeply impressed the jury. They were told, in effect, that everybody would naturally believe from the testimony of the defendants "that the boy came along with his father, driving the team; that he acted as the *servant and agent of his father;*" that there was "not a man in the courtroom," who had heard the boy's testimony, that "would think for a moment that the boy brought the father to town," but they "would say that the boy came along with his father;" and it was repeatedly said that, from the boy's testimony, it would be presumed that the boy "acted for his father" in driving the team. From such remarks the jury and the bystanders would naturally infer that, in the opinion of the court, the testimony of the defendants was unworthy of credit, and that no one in the courtroom would believe them. And so when the direct question was put to the court, it was frankly stated "that, from the manner of" the defendants upon the stand, the court did not believe them. This court has repeatedly applied liberal rules to the remarks of trial judges in the presence of the jury. *Gilchrist v. Brande,* 58 Wis. 184, 192–195, 15 N. W. 817; *Stiles v. Neillsville M. Co.* 87 Wis. 271, 58 N. W. 411; *Baker v. State,* 88 Wis. 156, 59 N. W. 570; *Owen v. Long,* 97 Wis. 83, 72 N. W. 364. While we would be unwilling to reverse the judgment merely because the court, in answer to a direct question put by counsel for the defendants, expressed an opinion that their testimony was unworthy of credit, yet it is obvious that it must have made a deep impression upon

the jury, especially in connection with the remarks of the court which preceded. Such remarks had a direct bearing upon the vital controversy in the case. Notwithstanding the fact that such remarks were very objectionable, yet they do not constitute reversible error, for want of exception. *Lowe v. State,* 118 Wis. 641, 96 N. W. 417–421, and cases there cited.

3. Exception is taken to a portion of the charge to the jury on the question whether the plaintiff was using ordinary care in attempting to pass over the crossing at the time of the accident, as follows:

"You have heard the old gentleman's testimony, both on his direct and cross examination, as to what he did. He tells you that when he got near Court street corner, at Fortney's Hotel, that he stopped a moment; that he looked and listened, and that he did not see any team in sight; and that he proceeded on an average gait, such as he was in the habit of using, to cross this street at the proper crossing at the time. . . . *What would you have had him do, any more than he did do?*"

This left the jury to infer that, in the opinion of the court, the plaintiff had done everything that the law required him to do, and that his statement as to what he did was a verity in the case, and must be accepted as true by the jury. This, we think, was invading the province of the jury, especially when considered in connection with the remarks of the court on the motion for a nonsuit, to which attention has already been called. Taken together, the jury would naturally infer that the court was of the opinion that the plaintiff was worthy of credit, and that his testimony would be accepted as true, but that the testimony of the defendants was unworthy of credit, and contrary to the presumptions arising from their own testimony. The defendants were entitled to a fair trial by an unprejudiced jury. We do not think they have had such a trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SWENNES, Respondent, vs. SPRAIN and others, Appellants.

November 19—December 11, 1903.

Pleading: Equity: Injunctions: Highways: Encroachments: Res adjudicata: *Same cause of action: Estoppel: Justices' courts: Practice.*

1. The allegations of a complaint for an injunction to restrain town officers from removing a fence which was claimed to be an encroachment on the public highway, and containing allegations of a previous action in the name of the state against the present plaintiff for the purpose of collecting a forfeiture for the maintenance of an encroachment upon a highway at the *locus in quo*, and judgment therein in favor of the state, examined and *held* to state a good cause of action in equity.
2. In order that the judgment in an action may be *res adjudicata* upon all questions which might have been litigated, the second litigation must be between the same parties or their privies, and upon the same cause of action.
3. An action under sec. 1331, Stats. 1898, to recover a penalty for the maintenance of an existing fence which encroached on the highway, where only the question of encroachment was pleaded and litigated, and an action in equity to enjoin the removal of a contemplated fence upon substantially the same line, while the same legal principles might be decisive in both cases, are not both founded on the same cause of action.
4. Where, in the trial of an action by the state to recover a penalty for maintaining an encroachment on a public highway, the only question litigated was whether the fence constituted an encroachment, no question as to the title to the land on which the fence stood, or the legality of the highway, being raised, litigated or decided, the judgment in that action is not *res adjudicata* in a subsequent action raising the question of title.
5. In an action in equity to restrain the removal of a fence claimed to be an encroachment, plaintiff alleged title to the *locus in quo*, and set up a former action in the name of the state, brought in justice's court, to recover a penalty for maintaining an encroachment; that therein the title to the *locus in quo* was not raised, litigated or decided, and that judgment was entered therein in favor of the state. *Held*, that the defense of title was entirely available to plaintiff in the action in justice's court by plea and certification to the circuit court, in which plaintiff had not been prevented by fraud, accident or mistake, and hence failure to plead title in that action prevented a court of equity from affording him affirmative relief on that ground.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action in equity brought to enjoin the supervisors and highway officers of the town of Barre, La Crosse county, from removing a fence which they claimed to be an encroachment upon the common highway. The complaint, after stating the official character of the defendants, alleges, in substance, that the plaintiff owns and occupies a certain described forty-acre tract of land in the town of Barre; that in December, 1901, the defendant supervisors caused an action to be commenced in a justice court in the name of the state against the plaintiff for the purpose of collecting a forfeiture for the maintenance of an encroachment upon a highway of said town, claiming that the plaintiff's fence on the west side of said forty acres constituted said encroachment; that issue was joined in said action solely on the question whether said fence constituted an encroachment, and the question of the plaintiff's title to the strip of land on which the fence stood, or as to whether the legal highway in fact existed, was not raised, litigated, or decided in said action; that the said action was tried, and judgment rendered therein that said fence encroached on the highway twenty links at the north end, and thirty-three links at a point fifteen chains south of the north line, and adjudged that plaintiff pay a penalty of $5 and costs of suit, and remove such encroachment within twenty days; that the plaintiff appealed from such judgment to the circuit court, which court decided that such appeal could be heard only on the original papers and return of the justice, and rendered judgment affirming the judgment of the justice, except as to a trivial change in the amount of encroachment, and adjudged that the fence be removed within twenty days from February 21, 1902; that the plaintiff now owns, and for many years has owned and occupied adversely, said strip of land, and that the same constituted no part of any highway, and that the fence has been

maintained for more than thirty years last past, but that the defendants, April 27, 1902, forcibly entered and removed said fence, and that plaintiff thereafter rebuilt the same, but the defendants removed the same again, and threatened to continue to remove said fence whenever it should be rebuilt, and to permanently use and occupy said strip of land as part of the highway; that the said forty-acre tract is a part of the plaintiff's farm, on which the plaintiff raises large crops and pastures large numbers of cattle, and that it is necessary that said farm be kept fenced, in order to protect the said crops, and to keep said cattle from straying away; and that the plaintiff has no adequate remedy at law. To this complaint the defendants demurred generally, which demurrer was overruled, and the defendants appeal.

The cause was submitted for the appellants on the brief of *Higbee & Bunge.*

A. E. Bleekman, for the respondent.

WINSLOW, J. The complaint doubtless states a good cause of action in equity, unless the allegations concerning the previous encroachment action and the judgment rendered therein make it demurrable. *Uren v. Walsh,* 57 Wis. 98, 14 N. W. 902. The appellants claim that the judgment in the encroachment action is *res adjudicata* upon all questions which might have been litigated in that case. This claim cannot be sustained. In order to have such an effect, the second litigation must be between the same parties or their privies, and upon the same cause of action. *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589. If it be conceded that the present action is substantially between the same parties as the encroachment action, it manifestly is not upon the same cause of action. The encroachment action was an action under sec. 1331, Stats. 1898, to recover a penalty for the maintenance of an existing fence which encroached upon the highway. The present action is an action in equity to enjoin the super-

visors from removing a contemplated fence upon substantially the same line. While, under proper pleadings, the same legal principle might doubtless be decisive in both cases, it would be a misnomer to say that they are both founded upon the same cause of action. So the judgment in the encroachment action is only *res adjudicata* in this action upon questions which were actually litigated and decided in the former action.

Undoubtedly the defense of no highway, or, in other words, of title to the strip, might have been pleaded in that action; but the complaint alleges that only the question of encroachment was there pleaded and litigated, and this allegation is, of course, conclusive on demurrer. The two questions are separate and distinguishable. *Soule v. State,* 19 Wis. 593. Thus it clearly appears that the judgment in the encroachment action is not *res adjudicata* in this action upon the question of title, because that question was not litigated, and the present action is not upon the same cause of action.

Appellants, however, invoke another legal principle which is fatal to the complaint. The defense of title was entirely available to the plaintiff in the encroachment action. He should have pleaded it in justice's court, and the case would have been certified to the circuit court on the plea of title. He was not prevented from doing so by fraud, accident, or mistake. In this situation, equity will not afford him relief. He should have made his defense when he had a clear opportunity at law in an action where a jury could have been had. Having failed to do so, it has become what is called a "pretermitted defense," to which equity will not listen as a ground for affirmative relief. *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891.

By the Court.—Order reversed and action remanded, with directions to sustain the demurrer, and for further proceedings according to law.

FRANZINI, Respondent, vs. LAYLAND and others, Appellants.

November 20—December 11, 1903.

State boundaries: Mississippi river: "Main channel": Acts of Congress: Construction: Bayous: Acquiescence of sovereignties as evidence: Private parties: Riparian rights: Navigable waters: Title to unsurveyed islands: Presumptions: Mistake in public land surveys.

1. The boundary line between this state and the state of Minnesota, where the Mississippi river divides them, is the center line of the main channel of said river.
2. The main channel of the Mississippi river means the principal navigable and navigated channel, the one customarily followed in steamboat navigation.
3. Such boundary line may be very near the Wisconsin shore at some points, and very near the Minnesota shore at others, according to the location of the main navigable and navigated channel. It is a changing line, subject to property rights, as the pathway of navigation changes, according to the design of locating it at the center of the main channel that being to preserve for all time, within the boundaries of this state, one half of the navigable pathway of the river wherever located.
4. The term "Mississippi river" used in the enabling act (ch. 89, p. 56, 9 U. S. Stats. at Large), descriptive of the boundary between this state and the state of Minnesota, applies to the broad expanse of water flowing in a generally southerly direction, known at the date of such act as such river, not any bayou upon either side thereof.
5. No such bayou, though navigable when the state was admitted into the Union and then furnished and now furnishes the most feasible navigable channel for boats between the entry thereto and outlet thereof, can properly be referred to as the Mississippi river, the main channel of which is traversed by the boundary line between the states.
6. Long acquiescence by sovereignties in a given situation as regards the boundary line between them, is very strong evidence of the right of the matter, is conclusive between private parties, and may be of such length of duration as to be likewise conclusive between sovereignties.
7. A riparian proprietor upon a navigable stream in this state has absolute title to the land to the line of ordinary high water mark by virtue of the chain of title reaching back to the sovereign proprietor; but, as incident thereto, subject to what is

said in the next paragraph, he owns to the center of the stream by the grace of the state, subservient, however, to public rights, substantially the same as those incident to navigable waters at the common law; and the size of the river does not in any event affect this rule.

8. Where a river separates this state and another, the title, by grace of the former, to land owned by a riparian proprietor upon its side of the stream, goes to its boundary line, regardless of whether that is nearer to or further from the shore than the *filum aquæ* of the stream.

9. Unsurveyed islands in navigable rivers in this state are presumed to be appurtenant to the surveyed land near by, within the limits of which they fall as regards riparian rights, and, nothing appearing to the contrary, such an unsurveyed island is presumed to pass with a conveyance of the surveyed land to which it is so appurtenant.

10. In case of a mistake in making the public land surveys, by omitting to survey any island in a river, such mistake can be taken advantage of only by the government, by proper proceedings to be relieved therefrom upon the same ground that any other proprietor might be relieved under the same circumstances. Until it acts in the matter the island will be deemed to be governed by the rule above stated.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action for damages to real estate caused by cutting and removing therefrom small timber. It was commenced in justice court, and on a plea that the title to real estate would come in question was duly removed to the circuit court. Plaintiff's title to the land involved was put in issue, and was the only matter of consequence controverted upon the trial. The evidence in respect thereto was to the following effect:

The land consists of an island in the Mississippi river not included in the public land surveys of the United States. The area thereof, excluding a bay that indents it from the southeast, is about forty acres. It is within what would be, if they were run out, the boundary lines of section 20, town 13, range 7 west. Such lines on the east, west and south, and

part on the north, were never run, because the territory was covered by water and included within the banks of the Mississippi river. The only land in section 20, of sufficient importance to be taken note of by the public surveyor and reported to the United States Land Office, as he viewed the matter, is in the northeast part thereof, being the southerly part of an island and containing fifty-one acres and a fraction. It was designated and is known as "Lot 1" in said section 20. The survey was made in the latter part of 1846 and reported to the United States Land Office in the early part of 1847. The report thereof, and the official plat of the land according thereto, are to the effect that the territory west of lot 1 and east of the Minnesota shore was in 1846 covered by the water of the Mississippi river proper. The land in question, called "Island No. 4," lies west of lot 1 and is separated therefrom by shallow water, the distance between the two bodies of land being, on the average, about 100 feet. Such territory is called "Sand Slough." In a low stage of water it is entirely closed at the northerly end by a sandbar. In an ordinary stage of water it is not navigable except by small boats. It is not a steamboat channel. While the public surveyor did not mention island No. 4, the evidence is unmistakable that it, in part at least, existed at the date of his survey. As early as 1877 large trees were standing on the westerly side thereof, and also stumps of trees fourteen inches in diameter. In 1846 and long prior thereto, about six miles above the land in question, a part of the water of the Mississippi river flowed from the main body thereof in a narrow but navigable channel, customarily used by steamboats, to the east of the main river, the greatest distance at any point east being about two miles, and connecting with the main river at the southerly point of lot 1 aforesaid. This channel was known at the time the public survey was made as "Coon Slough." It was, on the average, not more than one fifth of the width of what was recognized as the Mississippi river.

The river, so called and platted, was navigable, but Coon Slough formed a cut-off, and, as before indicated, was customarily used by steamboats. Such was substantially the condition of things when the state of Wisconsin was admitted into the Union. All the territory between Coon Slough and the main river—the area thereof being equal to many sections of land—was then considered as east of the Mississippi river and included within the new state of Wisconsin. Several years ago, near the head of Coon Slough, the general government built a dam in the main river so as to turn more water into Coon Slough. That has considerably changed the relative amount of water flowing in the two channels. However, Coon Slough at the northerly line of lot 1 aforesaid, remains very narrow as compared with the distance from the westerly side of the land in dispute to the Minnesota shore. Such distance is about 900 feet. It still has the appearance of being the main Mississippi river. Lot 1 aforesaid, being low land and subject to overflow, was, in 1850, held by proper authority to be swamp land and to belong to the state of Wisconsin as land within its territory under the swamp land act. It was certified accordingly. March 27, 1895, it was conveyed by the state of Wisconsin to the respondent in this action. No claim was ever made to the land in controversy, either by the general government or by the state of Wisconsin, independently of lot 1. Soon after respondent received his patent he took possession of Island No. 4 as included therein, and was in the actual possession thereof when the acts complained of occurred. Ever since Wisconsin was admitted into the Union the territory between Coon Slough and the Mississippi river, so called, has been considered by all public authorities as within the state of Wisconsin. It has exercised governmental control over the same for the purpose of taxation and all other purposes; the west channel of the river being recognized by the state of Minnesota as the boundary water between the two states.

Upon such evidence, and undisputed evidence in respect to defendant's having cut small timber from Island No. 4 and the measure of respondent's damages in case he was entitled to recover, the court directed a verdict in his favor. Judgment was rendered accordingly, exceptions being saved to rulings of the court sufficient to preserve for review the questions discussed in the opinion.

Silbaugh & Bennett, for the appellants.

C. W. Graves and *Ray B. Graves*, for the respondent.

MARSHALL, J. Counsel for appellant argue that at least it is a jury question, on the evidence, as to whether Coon Slough is not the boundary water between the states of Wisconsin and Minnesota, which, if solved in appellants' favor, would leave the entire territory west of the slough within the latter state. In support of that it is urged that the center of the navigable channel of the river is the true boundary line; and that the evidence is to the effect that Coon Slough was, when Wisconsin was admitted into the Union, and ever since has been, customarily used as the steamboat channel. The evidence as a whole leaves little doubt, if any, that the west channel of the river—the part known as the Mississippi river in 1846 and as far back as we have any history of the matter, and ever since that date—is what the law-making power had in mind when the act of Congress was passed enabling Wisconsin to be admitted into the Union, and fixing the westerly boundary thereof at the center line of the channel of the Mississippi river. The language of the enabling act (ch. 89, p. 56, 9 U. S. Stats. at Large) clearly indicates that it was framed with reference to rivers as they were then understood to exist and were shown upon maps of recognized accuracy. It is hardly worthy of serious thought that a narrow, though navigable, bayou upon either side of the river at any point could have been supposed would ever be taken as the Mississippi river mentioned in the act. There are many such

bayous along the Mississippi river upon both sides thereof, some of them being many miles in length and with much territory between them and the main river, but we venture to say that none of them were ever considered as forming boundary water between states under any enabling act admitting such states into the Union and fixing the boundary between the same at the center of the main channel of the river. If that were not sufficient on this branch of the case, the undisputed evidence that for over fifty years, for all governmental and other purposes, the territory between Coon Slough and the Mississippi river proper has been considered by this state, the general government, and the state of Minnesota as well, as east of the boundary line between the two states, would be conclusive evidence, at least in a suit between private parties, of its proper location. Acquiescence for a long period of time is evidentiary of the right involved between sovereignties as well as between individuals. In *Indiana v. Kentucky,* 136 U. S. 479, 510, 10 Sup. Ct. 1051, 1054, involving a dispute as to the boundary line between those states, as regards a situation very similar to the one before us—the point of dissimilarity being one which renders the rule announced peculiarly applicable here, in that, while no dispute has ever arisen between this state and Minnesota as to whether the territory in question is within the dominion of Wisconsin, a dispute there existed as to the boundary, though it was inconsistent with acquiescence that had continued for a long term of years—the federal court said:

"The long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized,

that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

In a similar controversy between the states of Rhode Island and Massachusetts (decided by the same court), 4 How. 591, it was held that long acquiescence by one state in a claim of sovereignty by another, in respect to territory upon the boundary line between the two, was sufficient to remove all doubt as to the right of the state to exercise such authority, this language being used:

"No human transactions are unaffected by time. . . . For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Appellants' counsel, conceding for the argument that the western boundary of this state is west of lot 1 aforesaid, insist that it is midway between the westerly meander line of said lot and the Minnesota shore. On that theory they easily establish the *locus in quo* without this state, it being 1,150 feet from such meander line and only 900 feet from such shore. In that counsel start with a false premise; therefore the conclusion is necessarily wrong. The boundary line in question is not the center line of the Mississippi river measuring from shore to shore, but is the center line of the main channel of the river, the navigable and navigated channel, regardless of the distance thereof from either shore. It may be very near the Minnesota shore at some points, and very near the Wisconsin shore at others, according as the deep-water pathway used for steamboat navigation varies. It is not referable, necessarily, to the condition of the channel at the time the state was admitted into the Union. It is a shifting line, subject, however, to property rights, the idea, em-

bodied in the enabling act permitting Wisconsin to come into the Union as a state, being that there shall be for all time preserved within its boundary one half of the main navigable channel of the river. This has been a subject of much consideration by the courts in years past, and there is nothing in respect thereto left to be settled. In *Dunleith & D. B. Co. v. Dubuque Co.* 55 Iowa, 558, 8 N. W. 443, the supreme court of Iowa took the ground that the language of the enabling act respecting the boundary line between that state and Illinois, should be construed to mean the center line of the river, measuring from shore to shore, arguing that such must be the case since the center line of deep water, followed as the navigable pathway of the river, is sinuous, imperceptible to ordinary observation, unascertainable other than by soundings, unknown to persons other than experienced navigators, and constantly changing.

"It cannot be possible," said the court, "that congress and the people of the state, in describing its boundary, used the word 'channel' to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The center of this river-bed channel may be readily determined, while the center of the navigable channel often could not be known with certainty. The first is a fit boundary line of a state. The second cannot be."

In *Buttenuth v. St. Louis B. Co.* 123 Ill. 535, 17 N. E. 439, the Illinois supreme court took exactly the opposite view, holding that not only the literal sense of the language of the enabling act fixing the boundary line of that state upon the west, but the sense thereof when applied to the object sought to be attained thereby, is that such boundary is the center line of the main channel of the river, the channel used for navigation by steamboats; and that it was contemplated by congress that such line should vary according as the navigable and navigated channel of the river should change, to

the end that each state should possess within its boundaries for all time one half of such channel. This language was used by the court:

"It is the free navigation of the river—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway'—that states demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for the purposes of defense and commerce."

Later the diverse views held as indicated were considered by the federal supreme court, on appeal to its original jurisdiction to have the meaning of the term "center of the main channel" as used in the enabling act judicially determined, and the boundary line between the states, at the several bridges between such states judicially established, resulting in the view held by the Illinois court being adopted, the court saying:

"The true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

In accordance with that view a judgment was rendered to the effect that the boundary line between the states of Illinois and Iowa was at the middle of the main navigable channel of the Mississippi river. *Iowa v. Illinois,* 147 U. S. 1, 13 Sup. Ct. 239.

From the foregoing it is obvious that the boundary line between this state and Minnesota, at the place in question,

is somewhere west of Island No. 4, upon which the alleged trespass was committed. No one will question that the main navigable channel of the river proper is and always has been, since Wisconsin was admitted into the Union, to the west of such island. The body of water east of the island, called "Sand Slough," does not now appear to be, nor to have been during the last fifty years, suitable for steamboat channel, except on occasions of high water. There really is, at the point in question, but one navigable channel in the river proper, and that is west of Island No. 4. Therefore, if the *locus in quo* is appurtenant to any land from which it is separated by water, and of which it is, in a legal sense, a part under the law respecting riparian rights, that land is lot 1, which respondent owns.

Appellants' counsel further contend that the rule which generally prevails in this state, that a riparian proprietor of land bounded by a river not navigable takes absolutely to the center of the stream, and on a navigable river to the center thereof by such a qualified title as will not violate the public rights which were designed to be preserved to the people in the transfer of the submerged territory to the state, should not apply to large rivers like the Mississippi. No authority is cited to support such contention, and we venture to say that none exists. The authorities are distinctly to the effect that no discrimination can reasonably be made on account of the side of rivers. *Jones v. Soulard,* 24 How. 41. This state, by judicial authority so long acquiesced in as to become a rule of property, quite early established as its policy the doctrine that the title to a riparian proprietor upon a navigable stream goes not by force of his patent, whether received from the government or from the state, but by the mere favor or concession of the state to the center of the stream, subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in it in trust for their

use. *Willow River Club v. Wade,* 100 Wis. 103, 118, 76 N. W. 273; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 426, 84 N. W. 855, 85 N. W. 402; *Illinois C. R. Co. v. Illinois,* 146 U. S. 387, 13 Sup. Ct. 110. Whether such policy be out of harmony with the original design, or whether it was the best one to establish, cannot now be a subject for judicial consideration. There is no opportunity now for retreat. The state has taken its position, and property rights upon all our rivers have become vested with regard thereto, and the supreme judicial authority has many times affirmed that it possesses discretionary authority to part with its trust property to the extent mentioned,—that is, in such ways as do not substantially affect the purposes of the trust. *Railroad Co. v. Schurmeir,* 7 Wall. 272; *Rundle v. Delaware & R. C. Co.* 14 How. 80; *Barney v. Keokuk,* 94 U. S. 324.

The rule above stated must necessarily be modified as regards riparian proprietors upon a stream forming a boundary between two states, where the dividing line of jurisdiction is the center of the main channel of such stream, since the state cannot clothe a person with any interest in land beyond its boundary; and the same reason that occasions the concession to a riparian proprietor upon a navigable stream wholly within its boundaries, to the thread of such stream, requires the concession to go to such dividing line where the riparian proprietor is upon a navigable boundary river, regardless of whether such line be nearer to or further from his shore than the *filum aquæ* of the stream. So we find it held in the books that such is the case even where the boundary line of a state divided from another by a navigable river is at low water mark on the opposite shore. *Young v. Harrison,* 6 Ga. 132; *Berry v. Snyder,* 3 Bush, 293; *Blanchard's Lessee v. Porter,* 11 Ohio, 138; *Ware v. Houk* (Com. Pl.) 23 Wkly. Law Bul. 205. In *Berry v. Snyder,* ROBERTSON, J., who dissented from the judgment of the court as to a riparian proprietor

on the southerly side of the Ohio river having any title to the bed of the river, said as to the legitimate effect of the opposite view:

"Kentucky owns the Ohio river on its border, and low water mark on the opposite shore is its northern limit; and, according to Kent, if a grantee of land on the Ohio is bounded by ordinary low-water mark, he will hold to low-water mark on the opposite side—that is, the whole river will be the boundary, and the grantee will be entitled to all islands formed in the river by accretion or eruption."

Little more need be said to fully decide this case. We deem the law too well settled here to warrant discussing the subject, that a riparian proprietor on a river, nothing appearing clearly to the contrary, owns, as incident to the shore, all islands opposite the same so far as his riparian rights extend. *Chandos v. Mack,* 77 Wis. 573, 46 N. W. 803. The conveyance to the riparian proprietor of the title to the island in such a case is deemed to have been included in the conveyance of the main land. As regards the original proprietor, the general government, the omission to take notice of the existence of an island in making the public land surveys, and approval of the survey by sovereign authority, evidences that the omitted land was intended to pass as an incident of the land it lies opposite of, and is appurtenant to it if to any. *Fuller v. Dauphin,* 124 Ill. 542, 16 N. E. 917. Such evidence is conclusive in the absence of a judicial determination in favor of the government, relieving it from mistake upon the same grounds that a private party might be relieved under the same or similar circumstances. *Murphy v. Kirwan,* 103 Fed. 104. Obviously, a private person cannot raise the question if the government sees fit not to do so.

The foregoing rules indicate that the trial court could not well have taken any other course than to hold that the land in controversy belonged to respondent and that he was entitled to recover. There was no question of fact upon the evi-

dence upon which there was any room for a difference of opinion. The law was properly applied thereto, and the judgment must therefore be affirmed.

By the Court.—The judgment is affirmed.

KELLEY, MAUS & COMPANY, Respondent, vs. LA CROSSE CARRIAGE COMPANY, Appellant.

November 20—December 11, 1903.

Contracts: Breach: Measure of damages: "Lost use of factory:" Trial: Evidence: Pleading: Direction of verdict.

1. Where plaintiff contracted to deliver to defendant at a specified date certain vehicle springs, but failed to deliver any except a very small quantity until months after the contract date, if defendant, upon ascertaining the breach, with ordinary diligence could have promptly obtained springs such as those specified in the contract in the open market, he can recover, as general damages, the difference between the price at which he could have so obtained them and the contract price, together with such special damages as he must nevertheless have suffered, including necessary expenses in finding and procuring other springs, or in his efforts, consistent with reasonable prudence and diligence, to expedite delivery of the contract springs.
2. Where plaintiff contracted to deliver to defendant by an agreed date certain vehicle springs which had to be manufactured before they could be furnished, and defendant relied on plaintiff's frequent assurances that the springs would be shipped soon, and probably earlier than the springs could be manufactured elsewhere, plaintiff cannot complain because defendant omitted efforts to buy springs which had to be manufactured before furnished, if such would be the conduct of ordinarily prudent persons under those circumstances.
3. In such case, if it appeared that springs, such as defendant contracted for, were not purchasable in the open market, or were of designs specially adapted for defendant's vehicles and obtainable only by special order, and that, by plaintiff's failure to deliver at the agreed time, defendant was prevented from producing the number of vehicles which, but for plaintiff's

delay, defendant's factory would, with reasonable certainty, have produced; that defendant, with reasonable certainty, would have been able to have sold such output during the then current season, and that plaintiff had knowledge of such facts with reference to defendant's business, or of the vehicle manufacturing business generally, that plaintiff as a reasonable man should have contemplated such injury might probably result from such breach,—then defendant would be entitled to recover the value of the lost use of defendant's whole establishment as measured by comparison of its output according to its capacity under usual circumstances and its output as impaired by plaintiff's default, and in addition the expenses of reasonable efforts to expedite shipments under the contract, after plaintiff's default became apparent, and also the reasonable expenses of efforts to find and purchase springs from others to supply the place of those plaintiff failed to deliver on time, together with the increased cost of springs so purchased.

4. The rule that one who breaks a contract is liable to compensate the other party for all damages occasioned by the breach which might reasonably be expected to flow therefrom, does not require that the party breaking the contract should know in detail just what constitutes the loss, provided it be reasonable and within usual experience.

5. Plaintiff contracted with defendant, who had an established business as manufacturer of vehicles, to deliver at an agreed date certain vehicle springs for use in the manufacture of defendant's vehicles, but failed to do so until long after the agreed date, and long after the then current season of defendant's business closed. In an action for the contract price, defendant counterclaimed for damages to its business through such nondelivery. *Held*, that it was error to exclude evidence offered by defendant on its counterclaim on the following subjects:

(a) Evidence tending to prove even general knowledge on plaintiff's part of how the vehicle business was carried on, either in manufacturing, selling or obtaining the necessary supplies of material, and whether such knowledge was derivable from plaintiff's general familiarity with the vehicle business, or from facts communicated to plaintiff at or prior to the time of making the contract.

(b) Evidence of the custom of operating defendant's factory, tending to show the manner in which, and extent to which, non-supply of springs interrupted its operation and diminished its efficacy.

(c) Evidence of the actual effect of absence of springs after the time at which the plaintiff was bound by contract to make delivery.

(d) Evidence of the capacity of the factory during the period of complete or partial interruption after the springs were due, but confined, however, to that which was ordinary and usual.

(e) Evidence tending to show that defendant had sufficient supply of material and parts of vehicles—other than springs—and of labor to keep its factory running to an extent not exceeding that which was usual and customary.

(f) Evidence to prove the fact of sales in excess of what the factory was able to produce with the shortage of springs, and for that purpose the orders received, either before or after the contract, were relevant, provided they did not exceed such as should have been within the reasonable contemplation of the parties.

(g) Evidence as to whether a market existed from which the defendant, with reasonable diligence, could have supplied itself promptly enough to have avoided other damage by merely paying some enhanced price for springs. In this is involved testimony that springs in quantity for factories, such as defendant's, were ordinarily obtainable only by contract long enough in advance to enable manufacture; also description of springs contracted for, to the extent of showing whether they were peculiar in any of their details, so as to be especially adapted to the types of vehicles manufactured by defendant.

(h) Evidence to show the diligence exercised by defendant, after it had reasonable ground to believe plaintiff would default in seasonable delivery, in the way of attempting to obtain springs elsewhere or to expedite the shipments from plaintiff's place of manufacture, and therein to show representations and promises on the part of plaintiff which might have induced defendant to forego efforts which it might otherwise have made.

(i) Evidence as to the expenses incurred by defendant in reasonably diligent efforts to obtain springs after it had ascertained plaintiff's default to furnish the springs within the time limit of the contract.

6. Plaintiff contracted with defendant, who had an established business as manufacturer of vehicles, to deliver, at an agreed date, certain vehicle springs for use in the manufacture of defendant's vehicles, but failed to do so. In an action for the contract price defendant counterclaimed for damages through such nondelivery. *Held*, that it was error to admit evidence offered by defendant on the following subjects:

(a) Evidence of the money value of the time of defendant's

employees lost by reason of nondelivery of such springs. It is not a proper specific element of recovery.

(b) Evidence of profits on the specific vehicles included in orders received by defendant which it was unable to fill by reason of plaintiff's failure to furnish such springs.

(c) Letters between defendant and the company at whose factory plaintiff was having the contract springs manufactured, except as bearing on defendant's diligence.

(d) Evidence tending to show wilfulness of the plaintiff in its breach of the contract.

7. Where evidence had been given of the receipt by defendant of a letter from plaintiff, referred to in another letter received in evidence, that it was lost, and that after diligent search it could not be found, it is competent for defendant to prove its contents by a witness who had seen it.

8. In such case, nothing appearing to show that such letter was in plaintiff's custody, notice to plaintiff to produce it is not essential.

9. In an action founded upon breach of contract motive cannot create or increase liability for damages,

10. Defendant counterclaimed for damages for breach of a contract, confessedly made at a certain date, in failure to supply the contracted articles at the contract date. There was no allegation of a contract later than or different from the one admitted to have been made. *Held*, that evidence that at a later date the parties entered into a new agreement, upon consideration that defendant would refrain from supplying itself elsewhere, and at that time there was communicated to plaintiff additional and specific information of the injury to defendant which would follow a breach of the contract, was irrelevant.

11. It is error to direct a verdict where, on the evidence actually admitted, the jury might have found facts to warrant some recovery.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action for certain vehicle springs delivered by plaintiff to defendant under contract dated December 17, 1900, for 1,000 sets of springs, regular shapes and sizes, at three and one fourth cents per pound at La Crosse, with privilege of twenty-five cent. additional to March 1, 1901, subject to regular extras for springs other than standard. Answer admitted contract, alleged counterclaim, first, for payment of

freight, and, second, for failure to deliver fifty-two sets of springs, and a third counterclaim alleging that plaintiff failed to deliver springs at the time required by the contract, or within a reasonable time, whereby the business of defendant's factory was greatly interrupted, it was put to great expense in endeavoring to obtain springs in place of those which plaintiff should have delivered, and, generally, that it was subject to increased expense in operating its factory and in loss of time of employees by reason of want of springs, and that it lost many sales and the profits thereon, and also continuing loss of profits in its business, to the amount of $3,500. Defendant offered evidence that it was an old-established manufacturer of vehicles, having a factory at La Crosse with an output of approximately 6,000 vehicles per year; that plaintiff for many years had been engaged in the business of selling material, supplies, and parts of vehicles to such factories; that in conducting such business it was necessary to contract for supplies to meet the prospective requirements of the year's business; that the turning of the year occurred about July 1st; that the custom of such establishments was to sell vehicles by soliciting orders from dealers throughout the country, by traveling men and mail; that, having a contract for springs for 6,000 vehicles with a manufacturer designated as the Lewis Company, that company, in December, suffered destruction of its factory, whereupon defendant applied to the plaintiff for a supply of springs for the rest of that season's business, and the latter entered into the contract for the number therein specified. Defendant offered to prove the familiarity of the plaintiff with the method in which such business was done, and that it was informed, at the time of contracting, of the character of defendant's business, and of the fact that it had orders for a considerable number of vehicles. It was conceded that a reasonable time for the delivery of the springs was not later than about March 1, 1901; that the springs were not delivered, except a very small quan-

tity of them, until the months of July, August, September, and November of that year. Defendant offered to prove the method of manufacture; that it had men, and all other material except springs, to have supplied its orders, both those which it had on hand in December at the time of the contract, and those which it afterwards took; that it was delayed and prevented from filling many such orders of both classes wholly by reason of the delay in obtaining springs, and that its profits upon such orders were $5 per vehicle. It also offered to prove expenses for travel, etc., incurred in efforts to obtain springs, both from the plaintiff and from others also, after the plaintiff was in default, in order to diminish its loss; also the number of vehicles its factory would have produced but for want of the springs. The court excluded all these offers of proof, and ruled that no loss could be recovered upon orders which were not specifically communicated to the plaintiff at the time of making the contract. At the close of the evidence the amount of the plaintiff's bill was agreed upon, and the amount recoverable upon the first and second counterclaims, and the jury were directed to find a verdict in favor of the plaintiff for its bill, less the amount on said first and second counterclaims, and to allow nothing to the defendant upon the third counterclaim. Upon such verdict judgment was rendered in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *A. E. Bleekman,* and oral argument by *Mr. Bleekman* and *Mr. A. E. Bleekman, Jr.*

Benjamin F. Bryant, for the respondent

Dodge, J. The rule of law is general that he who breaks a contract is liable to compensate the other party for all damages occasioned by the breach, which might reasonably be expected to flow therefrom, under either ordinary circumstances, or peculiar circumstances of which the contractor is

informed at the time of contracting. Such damages are deemed to have been contemplated by the parties. *Hadley v. Baxendale,* 9 Exch. 341; *Griffin v. Colver,* 16 N. Y. 489; *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318; *Guetzkow B. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119. Such liability is, of course, limited to damages which reasonable diligence of the other contracting party could not avert; hence results that, in case of failure to deliver a commodity purchasable in the open market, the general damages are limited to the difference between the market price and the contract price, for reasonable diligence will in such case obtain the contracted article at the market price. Another limitation upon special damages is that they must not be so uncertain and conjectural that they cannot, with practical safety, be ascertained. *Griffin v. Colver, supra; Shepard v. Milwaukee G. L. Co. supra; Wright v. Mulvaney,* 78 Wis. 89, 46 N. W. 1045; *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896. It is under this last limitation that prospective profits have in many cases been held not a proper measure of damages. If, however, the contemplated result of breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Otherwise complete justice is not done, and the contract, which in ultimate analysis is the foundation of commerce, is robbed wholly or partially of its sanction. Only when the estimate of prospective profits involves such degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should courts reject it if loss of profits is the result of the breach of the contract. *Richardson v. Chynoweth,* 26 Wis. 656; *Poposkey v. Munkwitz,* 68 Wis. 322, 32 N. W. 35; *Treat v. Hiles, supra; Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513, 55 N. W. 856; *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785.

Attempting to apply these principles to the damages in the present case, some rules for ascertaining the damages recov-

erable become obvious: First, if the defendant, upon ascertaining the breach of this contract, with ordinary diligence, that is, the diligence which the ordinarily prudent and diligent man, or the great mass of mankind, under like circumstances, would have exercised, could have promptly obtained springs such as those specified in the contract in the open market, he can recover, as general damages, only the difference between the price at which he could so have obtained them and the contract price, together with such special damages as he must nevertheless have suffered, such as necessary expenses in finding and procuring such other springs, or in his efforts, consistent with reasonable prudence and diligence, to expedite delivery of contract springs. Of course, defendant's acts in omitting to make purchases of springs which had to be manufactured before they could be furnished must be viewed in the light of all the circumstances, including the frequent assurances from plaintiff that it would ship soon, and probably earlier than the springs could be made elsewhere. Plaintiff cannot complain because defendant relied on such assurances and pretermitted efforts to buy elsewhere, if such would have been the conduct of ordinarily prudent persons under those circumstances. If, on the other hand, the evidence shall disclose that springs such as defendant contracted for were not purchasable in the open market, or were of designs specially adapted for defendant's vehicles and obtainable only by special order to some manufacturer, so that they were not obtainable by such diligence as above defined, and that, by plaintiff's failure to deliver at the time agreed, defendant was prevented from producing from its factory the number of vehicles which, but for the plaintiff's delay in delivering, that factory would, with reasonable certainty, have produced, and that defendant, with reasonable certainty, would have been able to sell all of such output during the then current season, in such case it is clear the defendant would have lost the difference between the cost of manufact-

ure and the net selling price of the vehicles it was so prevented from manufacturing and selling. Such sum, then, it would be entitled to recover from plaintiff, if the latter had knowledge of such facts with reference to defendant's business, or to the vehicle manufacturing business generally, that its officers or agents, as reasonable men, should have contemplated that such injury might probably result from failure to supply springs at the time required by the contract. This is in effect allowing defendant the value of the use of its factory so far as that use was prevented by the breach of the contract, a method of measuring damages approved in *Hinckley v. Beckwith,* 13 Wis. 31. This method of measuring the damage is greatly more certain and comprehensive than that contended for by defendant, consisting of numerous elements. Thus the attempt to prove that defendant had orders for certain vehicles of which a part were canceled because of its delays in filling them, and to predicate thereon damages to the amount of the profits included in the price of the countermanded vehicles, involves the fallacious assumption that the profit on any such vehicles left on hand has been lost. Any such vehicles may afterwards have been, or may yet be, sold to others at the same or greater price. Again, the attempt, uncertain at best, to estimate the extent to which men in the several departments of the factory were kept in idleness by failure of seasonable delivery of springs, in order that their lost time might be recovered as a specific element of damage, is rendered wholly unnecessary, for that element will be included in the lost use of the factory and plant. Further, it is notable that allowance of both the last mentioned elements of damage would involve some measure of duplication. Still further, it appeared that defendant diminished its force somewhat, both in its factory and in its selling department. Now, if profits on countermanded orders were adopted, we see no reason why savings resulting from reduction of expenses must not be ascertained and deducted. That necessity disappears

if we ascertain the value of the lost use of the whole establishment as measured by comparison of its output according to its capacity under usual circumstances and its output as impaired by plaintiff's default. That, in the case of a long-established business, past experience may establish with sufficient certainty what would have been the course and results of that business during a certain period of interruption, has support from *Hinckley v. Beckwith, supra; Shepard v. Milwaukee G. L. Co.* 15 Wis. 318; *Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513, 55 N. W. 854; *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785. It is also held that the events which do in fact occur may serve to render sufficiently certain the damages, if they are not so extraordinary or beyond expectation that they would not have been reasonably within the contemplation of the contracting parties. *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896; *Guetzkow B. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300.

In addition to the element of damage already discussed, denominated "lost use of factory," the defendant is also entitled to recover the expenses of any efforts made by it, consistent with due and reasonable diligence, to avert such general damages, in the way of certain journeys of officers and employees to Racine and to Chicago to expedite the shipment of springs under this contract, after plaintiff's default became apparent; also in the way of some other trips to find and purchase springs from others to supply the place of those plaintiff had failed to deliver on time, together with the necessary increased cost of any springs so purchased. This class of damage results from the duty of the defendant already mentioned to exercise due diligence to minimize its damages after learning that plaintiff would default. The expense of such efforts is directly attributable to the breach of the contract, and, being but the legal duty of defendant, was, of course, within the contemplation of the parties at the time of contracting.

As we have already intimated, the liability of the plaintiff for any damages depends on whether it ought reasonably to have contemplated that damages of the general character might probably result from a failure to deliver springs at the time agreed. This does not require that it must have exact knowledge or information in detail. One who sells to a merchant necessarily contemplates that he will resell in the ordinary way, and at profits not unreasonably variant from the customary ones. One who sells to a manufacturer parts of vehicles, with a fixed time of delivery, must of necessity contemplate that their nondelivery at the time specified will inconvenience and disarrange the system of manufacturing. Especially is this true if he is familiar with the conduct of such factories generally. Hence it was entirely proper for defendant to have proved knowledge of the plaintiff's officers or agents as to the operation of such manufacturing plants, resulting either from its years of contact with such business, or from specific information given as to defendant's own situation or as to its sales, either made or expected, and the like, although the information did not extend to all the details, such as the persons to whom, or the prices at which, sales had been or were expected to be made. Factories are ordinarily operated at a profit, therefore a reasonable man may be assumed to contemplate that an interruption of the operation will cause loss to its owners. He need not know in detail just what loss, provided it be reasonable and within usual experience. *Guetzkow B. Co. v. A. H. Andrews & Co. supra.*

We have now indicated, at least generally, the elements which, in the light of the counterclaim and the evidence offered, may go to make up the damages recoverable under the third counterclaim, if the jury shall find the facts to warrant them. In so doing, we have by implication shown that very many of the exclusions of evidence assigned as error were erroneous, and we may dispense with discussion of most of

such assignments, which are very numerous. Such rulings on evidence resulted from primary errors as to the rule of damages and of the extent to which plaintiff must have had knowledge, in all the details, of the effects which its delay in delivery of springs would have on defendant. We may, however, briefly mention some of the classes of evidence which the court excluded:

As already said, the court should have admitted any evidence tending to prove even general knowledge on the part of the plaintiff of how the wagon business was carried on, either in manufacturing, selling, or obtaining the necessary supplies of material; whether such knowledge was derivable from its general familiarity with the wagon business, or from facts communicated to it at or prior to the time of the making of the contract.

Evidence of the custom of operating the factory, tending to show the manner in which, and extent to which, nonsupply of springs interrupted its operation and diminished its efficacy, was admissible.

Also evidence of the actual effect of absence of springs after the time at which the respondent was bound by contract to make delivery. This may involve the extent to which men were kept in idleness or the efficiency of their labor impaired, and the nonutility or lessened utility of any springs received from the plaintiff after the contract period, and especially after the alleged close of the season.

Also proof of the capacity of the shop during the period of complete or partial interruption after the springs were due, confined, however, to that which was ordinary and usual.

We are unable to discover the relevancy, however, of the money value of the time of men lost by reason of want of springs, as it is not a proper specific element of recovery.

Another class of evidence which was clearly admissible was that tending to show that defendant had sufficient supply

of materials and parts of wagons—other than springs—and of labor to keep its factory running to an extent not exceeding that which was usual and customary.

Also evidence to prove the fact of sales in excess of what the factory was able to produce with the shortage of springs. To this end the orders received, either before or after the contract, were relevant, provided they did not exceed such as should have been within the reasonable contemplation of the parties.

We, however, do not deem admissible proof of the profits on the specific vehicles included in these orders, for reasons already stated.

Another class of evidence which, generally, should have been admitted, was that bearing upon whether a market existed from which the defendant, with reasonable diligence, could have supplied itself promptly enough to have avoided other damage by merely paying some enhanced price for springs. In this is involved testimony which was offered that springs in quantity sufficient for factories such as this were ordinarily obtained and obtainable only by contract long enough in advance to enable their manufacture; also description of the springs contracted for, to the extent at least of showing whether they were peculiar in any of their details, so as to be especially adapted to the types of vehicles manufactured by defendant.

Evidence was also admissible to show the diligence exercised by the defendant, after it had reasonable ground to believe that plaintiff would default in seasonable delivery, in the way of attempting to obtain springs elsewhere or to expedite the shipments from plaintiff's place of manufacture, and therein to show representations and promises on the part of the plaintiff which might have induced it to forego efforts which it might otherwise have made; as, for example, in the release or partial release of its former contract with the Lewis Company of Michigan.

Defendant should also be permitted to prove expenses incurred in such reasonably diligent efforts to obtain springs after it ascertained that the plaintiff could not furnish them within the time limit of the contract.

Various letters between the defendant and the Higgins Spring Company, at whose factory plaintiff was having the contract springs manufactured, were offered in evidence. Possibly the fact of the writing of some of these letters might have been admissible as bearing upon the defendant's diligence, but of course they are *res inter alios acta,* and could not be received as evidence of any facts stated in them.

Evidence having been given of the receipt of a letter from the plaintiff, referred to in a letter received in evidence, and that diligent search had been made for that letter, but that it could not be found, offer was made to prove its contents by the testimony of a witness who had seen it. This was excluded, on what theory we do not understand. If the letter itself was material and its loss was established, the foundation for secondary evidence of its contents would seem to have existed. Notice to the plaintiff to produce it was not essential, for there was no reason to suppose that it was in plaintiff's custody, having been written to and received by the defendant.

The court rightly excluded evidence offered to show wilfulness of the plaintiff in its breach of the contract. Such fact was wholly irrelevant. Motive could neither create nor increase its liability in this action, founded upon breach of contract.

A special contention is made that, although plaintiff might not have had knowledge of such facts as to make it contemplate all the results of its breach at the time of the making of the contract in December, still on February 23d following it entered into a new agreement, upon consideration that defendant should refrain from supplying itself with springs elsewhere, that it would deliver all the springs mentioned

in the former contract within thirty days from that date, and that at that time it received certain additional and specific information of the predicament in which failure of delivery would plunge the defendant. Doubtless, if a new and valid agreement was made at that time, it would be material to establish the knowledge which the plaintiff had as affecting its liability for a breach of that agreement, provided any counterclaim had been pleaded for such damages. We find no such counterclaim, however. There is no allegation of a contract later than and different from that confessedly made on December 17th, hence the fact of the communications to plaintiff on February 23d was not relevant, and was rightly excluded.

From the foregoing it is of course obvious that the court also erred in directing a verdict in favor of the plaintiff, denying the defendant all recovery upon its third counterclaim. Evidence had been introduced or offered to establish the breach of the contract, to establish, at least, various efforts on the part of the defendant to minimize the damages resulting from that breach, in the way of seeking to obtain springs both from the plaintiff and from others, and that it had succeeded to some extent. Evidence had also been admitted of certain expenses in so doing, although that as to other expenses had been excluded. There was also evidence certainly tending to establish general damages in the line of impairment of the output of the factory, as above discussed, and the long experience of plaintiff in dealing with factories of this general character, so that, even from the evidence actually admitted, the jury might have found facts to warrant some recovery.

By the Court.—Judgment reversed, and cause remanded for a new trial.

RHODES and others, Appellants, vs. HALVORSON and others, Respondents.

November 20—December 11, 1903.

Trespass: Unrecorded highway: Statutes: Evidence: Appeal and error: Harmless error.

1. **In an action for alleged trespass in cutting down fences on plaintiffs' premises, alleged to be a public highway, the evidence considered and *held* to warrant the jury in finding that the road in question had been used and worked as a public highway for a period of ten years before the commencement of this action, and hence, under sec. 1294, Stats. 1898, that the *locus in quo* was a public highway.**
2. **It is not prejudicial error to admit immaterial evidence, which is harmless in its effect on appellant.**

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action for an alleged trespass for the cutting down of fences on the premises of appellants. Respondents entered appellants' premises and caused the fences to be removed upon the ground that they closed up the public highway, established by twenty years of adverse public user, and by having been traveled and worked for a period of ten consecutive years before this action was commenced. Appellants are the owners of the premises through which the alleged highway runs. Their land consists of two forties. On the division line between the forties is a fence, beside which the road runs. On the opposite side of the road is appellants' pasture land. The road runs north and south. The south end of the road runs into a public highway known as the "Bostwick Valley Road." The north end continues through lands lying in what is known as "Irish Cooley." The evidence shows that years ago there were gates at the ends of the road on respondents' land. Some of the witnesses testified that the road had been open and used by the public for

more than twenty years, and there was other evidence tending to show that the road had been so used and worked by the town authorities for ten years and over. The land lying next north of appellants' is occupied by one Filter, who during the last four or five years at times maintained a fence and gate over the road at or near the line between himself and appellants. He testifies that he erected the gate, and closed it for a few weeks in the spring and fall season, to keep his cattle from straying, but not intending to prevent the public from using the road. The jury found that the road had been used adversely by the public for the period of twenty years before this action was commenced, and that it had been used and worked by the town as a public highway for ten years or more. From the judgment on the verdict in respondents' favor, this appeal is taken.

For the appellants there was a brief by *Higbee & Bunge*, and oral argument by *George Bunge*.

For the respondents there was a brief by *Miller & Wolfe*, and oral argument by *W. F. Wolfe*.

SIEBECKER, J. Sec. 1294, Stats. 1898, provides, "All roads not recorded which shall have been or shall be used and worked as public highways ten years or more shall be deemed public highways," unless it comes within one of the exceptions under this section. These exceptions are not material to this case. Upon the evidence, the jury, under proper instructions, found that the *locus in quo* had been used and worked as a public highway for a period of ten consecutive years prior to the commencement of this action, namely, from 1890 to 1901. Appellants insist the court erred in submitting this question to the jury, for the reason that the evidence shows that fences and gates were maintained across the traveled track of the road on their land. The evidence establishes that no gates were maintained at or near the south line, where the track passed over appellants' land, for a period

of at least sixteen years prior to the commencement of this action. Some of the witnesses testified that a fence and gate had been maintained across the traveled road at the north line of appellants' land for a considerable period of years between 1890 and 1901. A number of witnesses, on the other hand, testified that they traveled over the road frequently during this period, and found it open, and observed no fence or gate. Mr. and Mrs. Filter, who occupied the land adjoining appellants' on the north, testified to the free and unobstructed use of the road by the public for twenty years or more immediately preceding the commencement of this suit, and that they did, during the spring and fall seasons in recent years, keep a temporary gate and fence at or near the division line between their land and appellants,' across the traveled track of this road, to keep their stock from straying off their premises. They also testify that such fence and gate were kept closed only a few weeks at a time during such seasons, causing slight, if any, obstruction to the use of the road by the public, and were not intended to close up the road, or prevent the public from using it as a public highway. This is all the testimony tending to show that gates and fences cut off public travel within the ten-year period covered by the verdict of the jury. There is an abundance of evidence sustaining the finding that the road had been worked as a public highway by the proper town authorities throughout and prior to this ten-year period. Upon this state of the evidence, we must hold that the jury were warranted to find the road in question had been used and worked as a public highway for a period of ten years before the commencement of this action, and that the *locus in quo* is a public highway. Among the cases in this court which recognize this principle are *Hart v. Red Cedar,* 63 Wis. 634, 24 N. W. 410; *Blute v. Scribner,* 23 Wis. 357; *Hanson v. Taylor,* 23 Wis. 547; *Scribner v. Blute,* 28 Wis. 148; *Chippewa Falls v. Hopkins,* 109 Wis. 611, 85 N. W. 553.

It is contended the court erred in receiving in evidence a large number of records pertaining to organizations of road districts, and the election of officers, levying taxes, and expending money for road improvements, because the evidence fails to show it affected appellants' premises. It is not entirely clear that all this evidence was material, but we perceive no prejudice in its admission. In so far as immaterial evidence was received, it was harmless in its effect, and could work no prejudice to appellants. Other exceptions were argued, which relate to branches of the case that have become immaterial, since, under the third and fourth findings of the jury, which were properly submitted, the *locus in quo* must be deemed a public highway.

By the Court.—Judgment affirmed.

ROBERTS, Appellant, vs. DECKER and another, Respondents.

November 21—December 11, 1903.

Limitation of actions: Pleading: Definiteness: Inconsistent defenses: Recording act: Occupancy: Actual notice: Riparian rights: Milldam in stream: Deeds: Construction: Adverse possession: Cotenants.

1. Where an answer, in pleading the statute of limitations, specifically refers to the ten-year statute by sections, the fact that possession for twenty years is alleged instead of ten, as against a demurrer *ore tenus*, is not misleading and does not vitiate the plea.
2. In an action of ejectment against D. and B., allegations of the answer that D. entered into possession with S. in 1888 under claim of title founded on two certain deeds, and that since that entry D. and S., and the defendants, as purchasers and grantees from them, have been continuously in possession under claim of title founded on said deeds, is *held* sufficient as against a demurrer *ore tenus*, although no deed is specifically alleged to have been executed to B.
3. Claims of title under the ten-year and twenty-year statute of limitations are not inconsistent. They may be pleaded as separate defenses in the same answer under the code.

4. Where the evidence shows that the grantee in a deed immediately took possession thereunder but did not record his deed, and that he and his grantees continuously remained in possession thereafter, such possession is actual notice of their rights, whatever they may be, to subsequent purchasers from the first grantor; and such unrecorded deed is admissible in evidence as against such subsequent purchasers.
5. A deed of land bounded by a millpond which is the mere enlargement of a river passes the land to the thread of the stream. *Lawson v. Mowry*, 52 Wis. 219, and *Fox River F. & P. Co. v. Kelley*, 70 Wis. 287, distinguished.
6. R. C. P., the owner of a millidam and waterpower on a stream, and of the land on both sides thereof, conveyed to J. N. P. and S. a fifteen-rod strip covering the west bank opposite the dam for some distance above and below, together with 1,500 inches of water under a five-foot head, and the grantees covenanted to defray half of the expense of maintaining the dam so as to keep up a five-foot head of water. It appeared that 1,500 inches of water under a five-foot head was more than half of the ordinary flow of the river. At the time of said conveyance there was a sawmill on the east side of the stream. Four months later R. C. P. conveyed to F. C. W. an undivided one third of the land on the east side of the river (the sawmill property) "together with the equal undivided one third of the sawmill situated on the above-described real estate and the equal undivided one third of the dam, waterpower, privileges and appurtenances thereunto belonging or in any wise appertaining." The next year R. C. P. made a conveyance to F. C. W. containing the same description as that in the last mentioned deed, except that the fraction one sixth was used instead of one third. F. C. W. conveyed to G. using the same description but substituting therein the fraction one half. Subsequently R. C. P. conveyed to S. and S. to G. the other half of the same described property. Thereafter G. conveyed to J. W. W. the land on the east side of the river "together with the sawmill situated on the above-described real estate and the equal and undivided one half of the dam, waterpower, privileges and appurtenances thereunto belonging or in any wise appertaining," and the property covered by such conveyance vested by mesne conveyances in defendants, who also by mesne conveyances acquired the title to the 1,500 inches of water under a five-foot head "together with all rights and privileges in and to the waterpower dam and flowage," etc., conveyed to J. N. P. and S. Several years later G. quitclaimed to plaintiff the undivided one half of said dam, together with the waterpower, etc., thereunto belonging. *Held:*

(1) The deed from R. C. P. to J. N. P. and S. conveyed the land to the middle of the stream, and insured to the grantees the use of the specified amount of water at all times, whether one half of the flow equaled that amount or not.

(2) The deeds from R. C. P. to F. C. W. referred to the east half, and not to the whole, of the dam and waterpower, and conveyed to him an undivided one half interest therein.

(3) The deed from G. to J. W. W. conveyed to the latter all of the former's interest in the dam and power, as well as in the sawmill.

7. In such a case, undisputed evidence that in 1874 G. was dispossessed of the entire property on the east side of the river by J. W. W., claiming under his deed, and that thereafter J. W. W. and his grantees had been in actual, exclusive adverse possession claiming title under such deed, and that until 1901 no one made any claim of title to the dam or waterpower, is *held* conclusive proof of adverse possession under the ten-year statute of limitations.

8. Where the person in possession of land under claim of title to the whole thereof has no knowledge that another, whose rights have never been acknowledged, claims an interest therein as his cotenant, it is not necessary that the possessor, in order to acquire title by adverse possession, should bring home to the person claiming cotenancy actual knowledge of the adverse character of his possession.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action of ejectment to recover an undivided half of a milldam, water power, and flowage rights which the plaintiff claims to own as tenant in common with the defendants. The dam is situated on the Embarrass river, at the village of Embarrass, Waupaca county, and is known as the "Palmer Dam." The answer denies any title in the plaintiff, and attempts to set up both the ten-year and the twenty-year statute of limitations as separate defenses, as follows:

"(2) And for a second and separate defense to this action these defendants allege: First. That on the 11th day of July, 1888, *E. F. Decker* and C. B. Smith entered into possession of said premises described in plaintiff's complaint, under claim of title, as tenants in common with John N. Palmer

and the said *E. F. Decker* and C. B. Smith and John N. Palmer and Mark Palmer claiming the whole of the premises or property and dam described in the complaint, founding such claim upon written instruments as being a conveyance of said dam described in the complaint, to-wit, a deed executed by Damon Brightman and wife to *E. F. Decker* and C. B. Smith on the 11th day of July, 1888, under their hands and seals, and duly witnessed by two subscribing witnesses, and by said grantors duly acknowledged, whereby the said Damon Brightman and wife granted and conveyed in fee simple to the said *E. F. Decker* and C. B. Smith, their heirs and assigns, forever, the undivided one half of the dam and property and water-power privileges described in the complaint, and the land and sawmill property adjacent thereto, said deed containing the usual full covenants, and which said deed was duly recorded in the office of the register of deeds for Waupaca county August 1, 1888, in volume 70 of Deeds, p. 348; and said *E. F. Decker* and C. B. Smith founding such claim upon a written instrument as being a conveyance in part of said dam from John N. Palmer and wife and Mark Palmer to *E. F. Decker* and C. B. Smith. Said deed was executed on the 11th day of July, 1888, under the hands and seals of the said grantors, duly witnessed by two subscribing witnesses, and by said grantors duly acknowledged, whereby the said John N. Palmer and wife and Mark Palmer and wife granted and conveyed in fee simple to the said *E. F. Decker* and C. B. Smith, their heirs and assigns, forever, the said dam described in the complaint, said deed containing the usual full covenants, which said deed was duly recorded in the office of the register of deeds for Waupaca county, August 1, 1888, in volume 70 of Deeds, on page 352. Defendants further allege that the conveyance above described from Damon Brightman and wife to *E. F. Decker* and C. B. Smith, and the conveyance from John N. Palmer and wife and Mark Palmer and wife, above described, to *E. F. Decker* and C. B. Smith, did vest the whole title of said dam and water and flowage described in the complaint in the said *E. F. Decker* and C. B. Smith. Second. That ever since said entry, and for more than twenty years immediately preceding the commencement of this action, these defendants, as purchasers and grantees of said premises from *E. F. Decker*

and C. B. Smith, and those under whom they claim as aforesaid, have been in the actual, continued occupation and possession of the said premises adverse to and exclusive of every other right, under claim of title founded upon such deeds above described. Third. That during the whole of said time since said entry the said premises, and the whole thereof, have been occupied and in possession of these defendants and those under whom they claim, and said premises have been used as a water power for a sawmill, and part of the time for a gristmill, and the possession of these defendants and their grantors from the time of such entry above set forth has been open and notorious and exclusive, and said premises have been inclosed. Fourth. And, by virtue of the premises above set forth, these defendants allege that the plaintiff is barred from having and maintaining this action by the provisions of sections 4211, 4212, and 4215 of the Revised Statutes, now here pleaded as a defense to this action.

"(3) For a third and separate defense, these defendants allege: First. That neither the plaintiff above named, nor his ancestor nor predecessor nor grantor, was or has been seised or possessed of the said premises described in said complaint, nor any part thereof, within twenty years before the commencement of this action. Second. That these defendants, their predecessors and grantors, have held the same premises, and been in actual continued possession and occupation thereof, and of the whole thereof, exclusive of every and any other right, for more than twenty years immediately preceding the commencement of this action. Third. And that, during the twenty years last before the commencement of this action, the said premises, and the whole thereof, have been protected by a substantial inclosure, and have been usually improved, and have been used for furnishing water for driving purposes, for hydraulic power, for running a sawmill and gristmill, and for such use as a hydraulic dam is ordinarily used. That the said dam has been kept in repair at all times during said twenty years, and been partially rebuilt—all done by these defendants, and by those under whom they hold. Fourth. That this action is therefore barred by the provisions of sections 4207, 4213, and 4215 of the Revised Statutes, which these defendants now here plead as a defense to this action."

On the trial before a jury the plaintiff relied upon record proof of title, and demurred *ore tenus* to the second alleged defense above quoted, and also moved that the defendants be required to elect whether they would stand on the second or third defense, both of which motions being overruled, exceptions were taken.

It appeared by undisputed evidence that both parties derived title, so far as they have any record title, from one Rufus C. Palmer, who owned the land on both sides of the river prior to 1855, at which time he built the dam in question. The river at this point runs north and south, and the dam extends across it from east to west, forming a millpond or enlargement above. At the east end of the dam is a sawmill, which was built by Palmer at some time prior to 1860. At the west end a gristmill was built prior to 1869, which, however, was destroyed by fire some years later.

At the close of all the evidence the court directed a verdict for the defendants, and from judgment thereon the plaintiff appeals.

For the appellant there was a brief by *Guernsey & Cole,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Mr. Llewellen Cole* and *Mr. Flanders.*

For the respondents there was a brief by *Wallrich, Dillett & Eberlein,* and oral argument by *C. F. Dillett.*

WINSLOW, J. The plaintiff's first contention is that the ten-year statute of limitations is not sufficiently pleaded. The claim is that the plea does not show that the defendants went into possession under an instrument in writing, and further that it is bad because it alleges twenty years' possession, instead of ten, as required by secs. 4211, 4212, Stats. 1898. The claim that the allegation of twenty years' possession, instead of ten, in any way vitiates the plea, if otherwise good and not misleading, is so obviously untenable that it is unnecessary to discuss it. If the defendants have had twenty

years' possession, they have certainly had ten. *Morgan v. Bishop,* 61 Wis. 407, 21 N. W. 263. The other claim is also untenable. While the answer is not a model of pleading, it certainly alleges that the defendant *Decker* entered into possession with one Smith in 1888 under claim of title founded upon two certain deeds, and that since that entry *Decker* and Smith, and the defendants as purchasers and grantees from them, have been continuously in possession under claim of title founded on said deeds. Thus it appears by the plea that *Decker* took possession under, and has always claimed possession under, a written instrument; and, while no deed is specifically alleged to have been executed to *Beedle,* he is described as a purchaser and grantee of the premises from *Decker* and Smith. As against a demurrer *ore tenus* we cannot but regard the answer as sufficient, especially in view of the fact that it specifically refers to the ten-year statute of limitations by sections, and so could not be in any way misleading.

The trial court was also right in refusing to require the defendants to elect between the two defenses. Under the Code a defendant may plead as many defenses as he has, even though they be based on inconsistent legal theories, unless they be so repugnant in fact that proof of one disproves the other. *South Milwaukee B. H. Co. v. Harte,* 95 Wis. 592, 70 N. W. 821. This court has held that an allegation of adverse possession for twenty years is not inconsistent with an allegation of actual ownership by deed. *Gilman v. Brown,* 115 Wis. 1, 91 N. W. 227. Certainly, if these allegations be not inconsistent, claims of title under the ten and twenty-year statute of limitations cannot logically be called inconsistent.

But one ruling in the admission of evidence is complained of, and this question will be first treated. One of the intermediate deeds in the defendants' chain of title, executed September 8, 1871, was never recorded; and the plaintiff ob-

jected to its introduction for the reason that his immediate grantor, John W. Goodwin, was a subsequent purchaser in good faith without notice, he having received and recorded deeds covering the whole dam in August and September, 1872, and the plaintiff having received and recorded his deed in August, 1901, and hence the unrecorded deed could not affect either Goodwin or the plaintiff, under the provisions of sec. 2241, Stats. 1898. The answer to the objection is that the evidence conclusively showed that the grantee in the unrecorded deed immediately took possession of the property thereunder, and that he and his subsequent grantees, including the defendants, continuously remained in possession thereafter; thus giving actual notice to Goodwin and to the plaintiff of their rights, whatever they might prove to be. *Prickett v. Muck,* 74 Wis. 199, 42 N. W. 256.

Coming to the merits of the case, we find that the facts were substantially without dispute. As to the record title, both parties trace their titles to Rufus C. Palmer, who originally owned the land on both sides of the river, and erected the dam in question, and built and operated a sawmill on the east side prior to 1860. There are two chains of title from Rufus C. Palmer—one covering the land on the east side of the river, and one the land upon the west side of the river—and the question as to the record title to the dam and water power depends upon the construction to be given to several of the deeds in these chains of title. The first deed was executed by Rufus C. Palmer October 8, 1866, to J. N. Palmer and W. H. Stacy, and covered a strip of land on the west side of the river fifteen rods in width along the river, beginning above and extending some distance below the dam, together "with 1,500 inches of water under a five-foot head," and containing a covenant by the grantees to defray half the expense of keeping up the dam so as to keep up a five-foot head of water. For convenience, this deed will be called deed No. 1. J. N. Palmer and Stacy built a gristmill on the west side in

or about the year 1869, and thereafter operated it by power from the dam. By subsequent conveyances Stacy's interest in the property described in the last-mentioned deed was vested in Mark L. Palmer, and on July 11, 1888, J. N. and Mark L. Palmer executed a deed to *E. F. Decker* and C. B. Smith, conveying no land along the river, but simply "1,500 inches of water under a five-foot head, together with all rights and privileges in and to the water power dam and flowage situated at the village of Embarrass, Wisconsin, known as the Palmer dam." The first deed, covering land upon the east side, was executed by R. C. Palmer February 22, 1867, to F. C. Webster (four months after the first conveyance on the west side, above mentioned), and conveyed an undivided one third of the land on the east side of the river (or the sawmill property), "together with the equal undivided one third of the sawmill situated on the above-described real estate and the equal undivided one third of the dam, water power, privileges and appurtenances thereunto belonging or in any wise appertaining." On the 28th of April, 1868, R. C. Palmer made another conveyance to Webster, containing the same description as that in the last-named deed, except that the fraction one sixth was used in the description, instead of the fraction one third; thus by the two deeds placing the title to an undivided one half of the property described in Webster, and retaining one half himself. These deeds will be referred to as deeds Nos. 2 and 3, respectively. Thereafter Webster conveyed his interest to John W. Goodwin, using the same description as in deeds 2 and 3, substituting therein the fraction one half, and R. C. Palmer conveyed to W. H. Stacy and W. H. Stacy to Goodwin the other half of the same described property. On April 7, 1874, John W. Goodwin conveyed to John W. and Celia White the land on the east side of the river, "together with the sawmill situated on the above-described real estate and the equal and undivided one half of the dam, water power, privileges and appurte-

nances thereunto belonging or in any wise appertaining." The property covered by this last deed became vested by mesne conveyances in *E. F. Decker* and C. B. Smith July 11, 1888, and Smith conveyed an undivided half interest in the dam and power to defendant *Beedle* December 5, 1899. On the 10th of August, 1901, John W. Goodwin quitclaimed to the plaintiff the undivided one half of the dam known as the "Palmer Dam," "together with all water power, privileges and appurtenances thereunto belonging or in any wise appertaining;" also all claims, demands, and causes of action growing out of the use of water from said dam. Whether Goodwin had any title to convey to the plaintiff when he executed this last-named deed depends primarily upon the construction to be given to deeds Nos. 1, 2, and 3, and the deed from Goodwin to the Whites.

The plaintiff's contention is that deed No. 1 conveyed no part of the stream or dam, but stopped at the water's edge, and that deeds Nos. 2 and 3 conveyed one half of the whole dam and power (subject to the use of 1,500 inches under deed No. 1), and that hence, when Goodwin purchased the remaining Palmer half from Stacy, he became the owner of the whole dam and power, and, having deeded but one half thereof to the Whites, he still retained one half, which he sold to the plaintiff.

Examining these claims in order, we must first consider what passed under deed No. 1. This deed, in terms, conveys a fifteen-rod strip, covering the west bank of the river opposite the dam, and extending some distance both above and below. The well-established principle is that a deed conveying the bank of a stream will be presumed to convey to the middle or thread thereof, unless such presumption be overcome by actual reservation in the deed, or by a clearly expressed intention in the deed to limit the conveyance short of that point. *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606. It is said that this principle does not apply to the case

of a grant bounded by the shore of a mill pond, because that is an artificial body of water; and reference is made to *Lawson v. Mowry,* 52 Wis. 219, 9 N. W. 280, and *Fox River F. & P. Co. v. Kelley,* 70 Wis. 287, 35 N. W. 744, as supporting this contention. These were cases of grants upon the banks of artificial canals, and have little or no application to a mill pond which is a mere enlargement of a river. The supreme court of Massachusetts, in a very similar case, held that a deed of land bounded by a mill pond created by an artificial dam, through which the thread of the stream has always been apparent, passes land to the thread of the stream. *Phinney v. Watts,* 9 Gray, 269. And we approve the doctrine. But it is said that the grant of 1,500 inches of water indicates clearly the intention to limit the rights of the grantee in the dam, and rebut the presumption that one half of it was intended to be conveyed. We do not find ourselves able to agree with this contention. It appears that 1,500 inches of water under a five-foot head was more than one half of the ordinary flow of the river. It may well be that the intent of this clause was simply to insure to the grantees the use of 1,500 inches of water at all times, whether one half of the flow equaled that amount or not. This seems as reasonable a construction as any other. So we do not find any clear intention expressed in the deed to limit the conveyance to the bank of the stream, either from this clause, or the covenant to defray one half of the expense of repairs to the dam; and hence the deed must be construed as conveying to the middle or thread of the stream, and thus covering one half of the dam.

This deed being so construed, there can be little doubt as to the proper construction of deeds Nos. 2 and 3. It is true that the words in these deeds are ambiguous, and might be construed as conveying one half of the whole dam and one half of the whole power, or as conveying one half of that part of the dam and power appertaining to the sawmill prop-

erty, i. e., one half of one half; but when we consider the circumstances under which they were made, namely, the fact that the west half had already been conveyed, also that the grantor retained one half of the sawmill, so that, if he conveyed one half of the whole dam and power, he would retain no power to contribute to the operation of the mill, we can entertain no doubt that these deeds, together with the following deeds, by which the whole title to the sawmill property and power appertaining thereto came into the hands of Goodwin, must be construed as referring to the east half of the dam and power, and not to the whole dam and power. Therefore, when Goodwin conveyed to the Whites, he owned simply this east half, and this brings us to the construction of the last-named deed. By this deed Goodwin conveyed the sawmill and land, and "one half of the dam, water power, privileges and appurtenances thereunto appertaining." The language is substantially the same as that used in the previous deeds which have been construed as referring to only the east half of the dam, and the question is whether the same construction must be applied to this deed. If it must, then Webster still retained one half of one half of the dam and power, and this interest has passed to the plaintiff, unless cut off by adverse possession.

It is said that it would be absurd to place a different construction upon substantially the same language in two deeds in the same chain of title, but this does not seem to be necessarily true. The facts and circumstances surrounding and following the transactions may be so different as to necessitate a different construction, and such seems to us to be the case here. When the Webster deeds were executed, as we have seen, the grantor still retained an interest in the mill, and would presumably desire to retain corresponding interest in the dam and power, but when Goodwin's deed was executed he was divesting himself of all interest in the mill and lands; he had no further use for dam or power; and, further-

more, it appears without dispute that his grantees went into possession of the whole property, and operated the entire dam, claiming to own it, repairing and collecting the revenues thereof, without claim or suggestion on the part of Goodwin of any right therein, for about twenty-seven years. Under these circumstances, it seems clear to us that the Goodwin deed to the Whites must be held to have conveyed Goodwin's entire interest in the dam and power.

But were the conclusion otherwise upon this question, the result of the action would be the same, for the reason that the undisputed facts show that the defense of adverse possession under the ten-year statute has been conclusively proven. The evidence shows, without dispute, that Goodwin has been dispossessed of the entire property since the execution of his deed to the Whites, in 1874, and that since that time the defendants and their grantors have been in actual, exclusive, and adverse possession, claiming title under deeds, and that during that whole time, and until some time in the year 1901, neither Goodwin, nor any one under him, ever made any claim of title to the dam or water power. No more complete case of exclusive and hostile possession on the one side, and abandonment of claim on the other, could well be proven.

But it is said that the defendants and their grantors were cotenants of Goodwin, and that they cannot claim to hold adversely until they have brought home to him actual knowledge of the adverse character of their possession. The difficulty with this contention is that there never was a time when the defendants or their grantors knew that any cotenancy on the part of Goodwin was claimed, and never acknowledged any such right. The rule as stated in *Sydnor v. Palmer,* 29 Wis. 249, is that where a tenant in possession, having once acknowledged the title of another cotenant, seeks to turn his possession into an adverse holding, he must bring home actual knowledge of his adverse holding to the cotenant, unless his exclusive holding has been so long continued as to

justify a finding of acquiescence on the part of the cotenants. *Saladin v. Kraayvanger,* 96 Wis. 180, 70 N. W. 1113. There has never been any acknowledgment of Goodwin's cotenancy here. The defendants and their grantors have apparently never known or suspected that any such claim existed. If it in fact existed prior to 1901, Goodwin kept the fact carefully within his own breast. To hold that the defendants must give notice of their adverse holding to one of whose claims they were in utter ignorance, and whose rights they had never acknowledged by word or deed, would be absurd.

By the Court.—Judgment affirmed.

LOOSE, Plaintiff in error, vs. THE STATE, Defendant in error.

November 21—December 11, 1903.

Trial: Rules of court: Setting aside: Discretion: Appeal and error: Criminal law and practice: Remarks of court: Separation and exclusion of witnesses: Violation of order by witness: Exclusion of evidence: Contempt: Competency of witnesses: Age: Birth: Family records: Memoranda: Best evidence: Rape: Consent: Assault with intent to commit rape: Statutes: Instructions to jury.

1. A trial judge may at pleasure set aside a rule of his own making, designed to regulate the continuance of causes after being once set down for hearing, without committing reversible error, or error at all, if the rights of no one are not thereby clearly and substantially prejudiced.
2. In a criminal case it is not error to say in the presence of the jury, in effect: A cause for arrest does not indicate any cause for conviction. When a person is duly charged in such a cause and placed upon his trial it is presumed to have been regularly done, but does not furnish any reason to be considered by the jury as regards the fact of guilt.
3. The placing of witnesses in a judicial trial under a rule as regards their presence in court other than when giving their testimony, until that shall have been given, and as regards communicating with each other till they shall have testified, is wholly a matter of judicial discretion.

4. If a witness put under a rule, as stated in the last paragraph, violates the same, it does not furnish any legitimate ground for the exclusion of his evidence if the party calling him is an innocent party in the matter.
5. In case of a violation of a rule as mentioned in the preceding paragraph, the person calling the witness being innocent in the matter, punishment for the transgression should be confined to the witness himself, as for a contempt of court.
6. A person having arrived at an age rendering him competent to testify as a witness in court, may give evidence respecting his own age, although his knowledge thereof be based wholly upon hearsay.
7. A family record is not the best evidence of a birth noted therein, nor original evidence in respect thereto, the person who made the record being alive, competent to testify, and within reach of the court. In such a case such record is of no higher dignity than any other memorandum.
8. The maker of a memorandum, or person who knew at some time that it was made correctly, may use the writing in or out of court to refresh his memory preparatory to testifying in respect to the matter therein referred to, and after doing so may so testify though having no present knowledge as to the truth of such matter independently of the writing.
9. The fact that the witness, in the circumstances above stated, fails to produce the memorandum in court, gives no ground for rejecting his testimony, unless he unreasonably refuses to produce it pursuant to the court's order. Absence of the writing can be considered as bearing on the credibility of the witness to such extent as the jury think proper under all the circumstances.
10. Under sec. 4382, Stats. 1898, disabling females under the age of fourteen years from consenting to sexual intercourse, one committing such an act upon such a female, regardless of the means used to accomplish it, and of the female's consent and co-operation, is guilty of the crime of rape.
11. An attempt to do the act mentioned in sec. 4382, Stats. 1898, regardless of the means resorted to and of whether the female consents or not, is an assault with intent to commit the crime of rape under sec. 4383, Id.
12. The fact that a person charged with the crime of rape under sec. 4382, Stats. 1898, may instead be charged under sec. 4580 with the offense of fornication, or be charged under appropriate statutes with the crime of seduction, or incest, according to the facts, does not militate against the validity of such statutes nor the wisdom thereof, since the manifest purpose of

the same is to insure adequate punishment, so far as practicable, of persons guilty of unlawful commerce with female children, avoiding the danger of their going entirely unpunished in some cases because of the severity of the penalty, or the law being endangered by the prohibition against cruel and unusual punishments,—in view of the change in the legal age of consent to fourteen years. Criticisms of the legislative policy, above indicated, made in *State v. Wentler*, 76 Wis. 89, withdrawn.

13. The rule as regards the evidentiary effect of disclosure or failure to make disclosure by a female, to those in her confidence, as regards a crime of rape perpetrated or attempted to be perpetrated upon her, does not apply where the element of nonconsent in respect to the offense is supplied by the statute and there is consent in fact.

14. Neither does such rule apply to a person to whom disclosure is made, who delays in reporting her knowledge to others or causing legal proceedings to be instituted.

15. It is not the duty of the court, nor is it proper as a general rule, upon request or otherwise, to point out to the jury the evidence of any particular witness upon a disputed matter, giving particular significance thereto and stating how it should or should not be viewed as regards the truthfulness thereof.

16. The suggestion customarily made to juries in prosecutions for rape, that they should view the evidence of the prosecuting witness with great care, having regard for her state of mind as an injured person, and be on their guard against being moved by sympathy for her to give undue weight to the state's evidence, does not apply to a case where, though there was nonconsent by force of the statute, there was consent in fact.

17. The court having instructed the jury in a criminal case that they should acquit the accused unless satisfied of his guilt from the evidence beyond every reasonable doubt, is not required, whether requested or not, to give further instructions on the same subject.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

Plaintiff in error was informed against for having, in the county of Milwaukee, August 19, 1902, had criminal knowledge of and abused Louisa Heyer, a female child under the age of fourteen years. Such proceedings were duly had in

respect thereto that the accused was found guilty by the verdict of a jury, of assault upon the person named with intent to commit the crime of rape. Judgment was rendered accordingly. The writ of error was sued out to review the same.

H. L. Eaton, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *W. D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

MARSHALL, J. The questions raised by the errors assigned so far as insisted upon, will be treated in detail and in the order of their presentation in the brief of counsel for plaintiff in error.

1. Did the court err in taking the case off the calendar November 21, 1902? That is predicated on these circumstances: Previous to the call of the case for trial it had been placed upon the day calendar for that purpose. There was a rule of the trial court to the effect that a case thus placed should not be continued beyond the time when regularly reached, in response to an application therefor by either party, unless for a cause not known to such party when the calendar was made up, or arising thereafter. Upon the trial day, the prosecuting officer made the application in question, giving as a reason that he had been unable to procure the attendance of the state's witnesses. Testimony was taken in open court in support of the application, showing that subpœnas for witnesses had been regularly issued and placed in the hands of an officer to be executed, and that he had made quite extensive efforts to do so and failed. The showing being satisfactory to the court the application was granted, the attorney for the accused objecting thereto. It is said that the ruling was in violation of the rule above mentioned, and of Circuit Court Rule XX. The latter plainly applies to continuances for the term, not such as the one in question.

The rule of the trial court, as the judge thereof held, was fairly complied with. We see no reason to override that decision. It was made in the due administration of the court's own rule, which it had authority to violate if it saw fit, saving the rights of adverse parties from serious prejudice. There was, however, no purpose to ignore the rule. On the contrary the court enforced it to the extent which justice seemed to require. Such a rule is one of procedure merely, made by the court for the conduct of its own business. A violation of it could not properly be considered reversible error under any circumstance, in the absence of the most clear and satisfactory showing that the objecting party was substantially prejudiced thereby. There is no showing at all in that regard appearing in the record.

2. Did the court, in the presence of persons called to serve as jurors, when they were examined as to their competency, make remarks prejudicial to the accused? These are the remarks calling for consideration under that proposition:

"There may be cause for a man to be arrested a great many times when there is no reason why he should be convicted."

"It is always supposed that there is sufficient reason for a man to be before the jury when he is charged with an offense, or otherwise he would not be there, but that is no reason to be considered by the jury at all."

The record does not disclose the cause for making such remarks. The occasion seems to have been the excusing of a juror for cause. The examination of the juror was not preserved in the record. The circumstances suggest that such juror, on his examination, probably expressed some leaning against the accused from the mere fact that he had been arrested and placed on trial upon a serious charge. In any event, the reasonable meaning of the language of the court seems to be that a man may be charged with being guilty of a criminal offense, constituting a legitimate ground for arrest-

ing and placing him on trial, yet there be no reason whatever for his conviction because of his innocence of the charge; therefore that the mere circumstance that an accused person, in the due course of the administration of justice, is compelled to submit to a trial on a criminal charge, should not have any influence whatever, upon the jury called to decide the matter, unfavorable to him. In that sense what the court said is not subject to criticism. It is proper to so inform a jury in submitting a case to them for final determination, or when being examined upon the *voir dire*. It cannot, when said at any stage of a case, be reasonably considered otherwise than as favorable to the accused.

3. Did the court err in receiving testimony against the objection of counsel for the accused?

At the commencement of the trial the court exercised its discretionary authority in accordance with the wishes of the accused, to exclude witnesses from the courtroom except as they were called to testify, yet subsequently witnesses were allowed to testify who had violated, innocently or otherwise, the order in that regard. The practice of putting witnesses under a rule during the trial, so that one shall not be affected in his testimony by that of another, and so that, so far as possible, concert between witnesses may be prevented, is as old as the history of trials in English courts. It is doubtless a very valuable means to the end to be attained, the discovery of truth. The use thereof is rarely ever refused when applied for by a party; while a careful court will sometimes discover situations where such means should be adopted, and act accordingly, without the application of counsel upon either side. Nevertheless, neither the exclusion of witnesses while others are testifying, nor the separation of witnesses till they shall have given their testimony, is a matter that can be insisted upon as a right. It is a subject wholly under the control of the court, limited only by the boundaries of sound judicial discretion. *Roberts v. State,* 122 Ala. 47, 25

South. 238; *Comm. v. Knapp,* 9 Pick. 496; *U. S. v. White,* 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *Hey v. Comm.* 32 Grat. 946; *Rooks v. State,* 65 Ga. 330; *Jemmison v. Gray,* 29 Iowa, 537; *People v. Hall,* 48 Mich. 482, 12 N. W. 665; *People v. Garnett,* 29 Cal. 625; *People v. McCarty,* 117 Cal. 65, 48 Pac. 984; *Rainwater v. Elmore,* 1 Heisk. 363. Being a discretionary matter, it falls within the famliar rule that the decision of the trial court in respect thereto is not subject to review except for a manifest abuse of power. That, obviously, involves a pretty clear showing in any case that the person objecting was prejudiced by the ruling. True, there is no want of authority that a party to a judicial trial is entitled as a matter of right to have witnesses put under a rule as to their presence in court during the examination of other witnesses, and as to their conduct during the trial of a cause before giving testimony. *Watts v. Holland,* 56 Tex. 60; *Smith v. State,* 4 Lea, 428. But the great weight of authority is the other way, and the judicial policy of this state is in harmony with such weight. Testing the complaint of the plaintiff in error on this subject by the foregoing, no reason is perceived for holding that reversible error was committed in allowing the witnesses to testify. There is no indication, that we can discover, that the accused was prejudiced by the court's ruling. However, if there were such prejudice, the doctrine supported by the weight of authority is that the violation of the court's order does not go to the competency of the violator as a witness unless the party calling him is a guilty participant therein. *Bulliner v. People,* 95 Ill. 394; *People v. Boscovitch,* 20 Cal. 436; *Rooks v. State, supra; Davis v. Byrd,* 94 Ind. 525. That is just. An innocent party should not be deprived of the testimony of one of his witnesses because of the latter's transgression of which such party is innocent. Such transgression may well bear on the credibility of the witness' testimony, as has often been held, many of the cases cited being

examples of that, but the direct punishment for the offense should be visited upon the offender himself, as for a contempt of court; and such is the rule laid down in many of the cited cases.

Complaint is made because the girl upon whom the offense was alleged to have been committed testified as to her own age. That was proper by a well-settled rule of evidence. Any one, after arriving at the age of discretion so as to be competent to testify as a witness at all, may give evidence as to his own age. 2 Jones, Ev. § 303, and cases cited. And that applies though the witness has no other knowledge in respect to the subject except that which was told him by his parents. *Hart v. Stickney,* 41 Wis. 630.

The father of the alleged abused child was permitted to testify as to her age. Objection was raised to that because the witness indicated that he relied in part, in giving his testimony, upon a memorandum made by him at the time of the child's birth, which memorandum was not produced in court. We are unable to discover any error in that. The witness testified to the effect that he was present at such birth, that he made the memorandum, and knew at the time thereof that he made it correctly. One may refer to a memorandum made by himself for the purpose of preparing to give testimony in regard to the fact involved, even if he has no present recollection independent thereof, so long as he knows that, when he made it, it was in accordance with the truth. *Bourda v. Jones,* 110 Wis. 56, 85 N. W. 671; *Nehrling v. Herold Co.* 112 Wis. 558, 568, 88 N. W. 614. The mere fact that the memorandum is not produced in court at the time the witness' testimony is given may go to the credibility of such testimony, but does not go to the competency thereof or justify the court in rejecting it unless the witness unreasonably refuses to comply with the order of the court to produce the memorandum. The idea suggested by counsel that the memorandum made by the witness in this case, which appears to

have been an ordinary family record, was the best evidence, cannot find favor. No mere private memorandum has that dignity, ordinarily. Generally speaking, its only proper use in a judicial investigation involving the matter to which it refers is to refresh the memory of the witness who made it or who at some time knew that it was correct, or as evidence in connection with the verbal testimony and as a part of the witness' evidence.

4. Did the court err in refusing to direct a verdict in favor of the accused?

The claim is made in support of the affirmative of that proposition that, since the charge was laid under sec. 4382, Stats. 1898, i. e., that the accused did wilfully and carnally know and abuse the female child mentioned, she being under the age of fourteen years, the calls of the statute were for some element of actual violence, or some actual force and subjection of the female's will; that carnal knowledge of the girl by her consent and co-operation does not satisfy the statute, nor a mere attempt in that regard, she consenting thereto, constitute an offense within the meaning of sec. 4383, Id., under which the accused was convicted; that if he was guilty of any offense it was that of fornication under sec. 4580, Stats. 1898, or of taking indecent liberties with the girl, not intending to commit rape upon her, under sec. 4588*a;* or else that secs. 4382 and 4383 are void for uncertainty, in view of the other sections referred to, under the reasoning in *State v. Wentler,* 76 Wis. 89, 44 N. W. 841, 45 N. W. 816.

We do not deem it necessary at this time to go into a very lengthy examination, analysis and discussion of the statutes referred to and others that might be mentioned, since the significant element in sec. 4381, placed there by the act of 1887, which mainly led to the condemnation thereof in *State v. Wentler,* was subsequently eliminated therefrom, and later, in *Proper v. State,* 85 Wis. 615, 55 N. W. 1035, and *Lanphere v. State,* 114 Wis. 193, 89 N. W. 128, secs. 4382 and

4383, and the whole code of laws so severely criticised in the former case, were in effect approved. The circumstances in *Proper v. State* were quite similar to those here. The accused was charged in one count under sec. 4382 and in another under sec. 4383. He was convicted under the latter. A correct understanding of the decision requires one to keep in mind that in *Fizell v. State,* 25 Wis. 364, the court held that the offense mentioned in sec. 4383, as regards females under the age of consent, is an attempt to commit the offense mentioned in sec. 4382, therefore that the latter necessarily includes the former. Counsel for the plaintiff in error argued, in *Proper v. State,* the same as counsel does now, that consent on the part of the female, though under the age of legal consent, is inconsistent with the crime of rape or assault with intent to commit such crime, supporting such views with substantially the same reasoning as counsel for plaintiff in error now indulges in. That does not clearly appear by the report of the case as published, but this quotation from the counsel's brief shows it very plainly:

"While the common form of an attempt to commit the ordinary rape is by assault with such intent and on an indictment for rape there may be conviction of assault if no technical rule prevents in matter of principle and by the better judicial determinations there cannot be under the common-law rules, an assault with intent to have carnal knowledge of a girl with her consent: because by the common law violence consented to is not an assault and the statute which makes her consent immaterial in defense of the carnal knowledge does not extend to the assault."

The court disposed of the argument, both as to the validity of the statute and as to the calls thereof being for some act of actual violence and being inconsistent with consent of the female, very briefly, using language to this effect:

"The prosecutrix, being under the age of consent, was conclusively incapable of legally consenting to the offense charged. It was therefore neither necessary to allege nor to prove want of consent. Any attempt to have carnal knowl-

edge of a female under the statutory age of consent is by force of the statute necessarily against her consent and forcible. There is no ground for saying that the statute under which the defendant was prosecuted is void for uncertainty."

The law of this state is so well settled along those lines that were it not for the contrary doctrine being forcibly urged upon our attention at this time we should not feel warranted in discussing the matter. The very clear statement of the law in *Fizell v. State* was never, after being there promulgated, seriously questioned here for some twenty years. The occasion of it then was the radical change in the statutes, making it possible that a person might be charged with the crime of rape based upon an act committed upon a consenting female who had arrived at the age of puberty and was a common prostitute, an act punishable possibly under either of several other statutes, and under sec. 4382, for a time, by life imprisonment, and after 1889, in effect, for that period. Such legislation was deemed so drastic by some that every possible effort that could be made was resorted to by ingenious counsel to avoid the literal effect thereof. However, in the very thorough analysis of all the statutes having any bearing on the subject, the court said, in *State v. Wentler,* 76 Wis. 89, 44 N. W. 841, 45 N. W. 816, in respect to sec. 4382:

"The offense punishable under this provision is established when it is satisfactorily proven that the person charged with such offense has in fact had sexual intercourse with the female named in the information, and that she was under the age of fourteen years; and the means used for the purpose of accomplishing such intercourse are wholly immaterial. It may be brought about by persuasion, force or fraud. Still the offense has been committed if the intercourse takes place, and it is as clearly applicable to a case of fornication, adultery, seduction, or incest as it is to a case of ravishment by force or fraud."

Taking that in connection with the very plain language of *Fizell v. State* to the same effect, of which it is merely af-

firmatory, notwithstanding the changes in the statutes to which we have referred, it will be appreciated how useless it is to consider the proposition counsel for plaintiff in error now urges upon our attention, unless we are prepared at least to seriously face the probability that it would be well and proper to overrule the decisions on this subject that have stood as the law of the state for twenty-five years. We are not so prepared. On the contrary, if it were an original question it does not seem that any different conclusion could reasonably be reached than that which was early declared.

As before indicated, while all the criticisms of the statutes found in *State v. Wentler* have been remedied or rendered by subsequent decisions unimportant,—since some of them have not been specially referred to in any subsequent decision, yet the general condition of our statutes which gave rise thereto has not been changed, the change made going only to the matters held in that case to be fatal; and we have evidence here that those things which brought out the other suggestions unfavorable to the laws still remain therein, and such suggestions are liable to be troublesome to trial courts and give false hopes to convicted persons for relief here, as is the case now,—we will go over the subject in response to counsel's argument.

In *State v. Wentler* the court pointed out these then seeming inconsistent and unreasonable features in the statutes punishing the various phases of unlawful intercourse between the sexes: (a) The ravishment of a female over ten and under fourteen years of age by force and against her will, under sec. 4381, is punishable with less severity than the ravishment of a female of the same age by her consent under sec. 4382, rendering the two provisions clearly in conflict. (b) Under sec. 4381 the circumstance that the female is a common prostitute mitigates the offense, though the criminal act be perpetrated by force and against her will, while the same act under sec. 4382 is punishable regardless of circum-

stances, by imprisonment of the male offender for life. (c) Under the various sections of the statutes circumstances might exist, as to an act of unlawful intercourse, such that the male participant therein might be prosecuted for incest, adultery, fornication, seduction or rape. (d) The result of holding that all of the several sections of the statutes are valid would be in effect to hold that they clothe the district attorney with authority to decide as to an act of a particular species of crime, under which of the various sections referred to the offender shall be charged. (e) The statute permitting punishment, as it may for an act of sexual intercourse with a common prostitute might fall under the constitutional condemnation of cruel and unusual punishments, and in any event that it is such an outrage upon justice as to suggest that the legislature did not intend to make such a law and to lead to the conclusion, upon comparing it with other statutes, that it is fatally repugnant to some of them providing for a more humane punishment, and is void. No suggestion was made that it was not within the power of the legislature to make laws with the features mentioned in "b," "c" and "d." The peculiar and unreasonable character thereof was merely referred to, under a familiar rule for judicial construction, as giving rise to ambiguity when the laws were considered with regard to the purposes thereof and compared with each other, requiring the court to determine the legislative purpose, if possible, otherwise than by looking at the letter of each statute by itself. The cause then under consideration, as indicated, arose under the statutes as they existed in 1888. It involved, directly, only the validity of the amendment to sec. 4382 contained in ch. 193, Laws of 1887, raising the age of consent from ten to fourteen years, leaving the punishment the same as before, and creating the repugnancy between such section and sec. 4381. Such difficulty was discovered and brought to the attention of the legislature at its session in 1889, before the court had spoken on

the subject. In an attempt to remedy the same, ch. 368, Laws of 1889, was passed. The defect subsequently said by the court to be fatal to the law of 1887, and the one strongly suggested as probably so, was sought to be cured by so amending sec. 4381 as to change the age limit therein to twelve years, the unfortunate mistake being made, however, of using the word "under" instead of the word "over," making the statute apply to offenses upon females under the age of twelve years instead of over that age, as was manifestly the legislative intent; and by so amending sec. 4382 as to change the age of nonconsent from fourteen to twelve years in harmony with the intended change in sec. 4381, and to make the punishment which theretofore was life imprisonment in all cases imprisonment for not more than thirty-five years nor less than five years. In 1891, at the first opportunity for dealing with the matter, after the mischief created by the mistake mentioned was discovered, and after the decision in *State v. Wentler* was known, the subject was again considered by the lawmaking power in the light of the judicial criticisms upon its previous work; and in what resulted, ch. 350, Laws of 1891, it must be presumed that the legislature intended to remedy all defects judicially discovered, so far as existing laws on the subject were in excess of legislative authority, and so far otherwise as in its judgment a remedy should be applied. Sec. 4381 was amended merely by correcting the mistake referred to. No other change was then made therein or in any other law on any kindred subject. The matter was again before the legislature in 1895, resulting in ch. 370, Laws of that year, whereby the age limit in secs. 4381 and 4382 was changed to fourteen years.

Thus, in the light of the severe criticisms made in *State v. Wentler,* of the laws on the subject of unlawful commerce between the sexes as such laws existed at that time, the legislature has twice specially considered the matter and generally considered the same in the late revision of the statutes, with-

out making any change except to eliminate the one feature said to be fatal to the law of 1887 and the one suggested as probably so,—those we have designated as "a" and "e." The conclusion from that seems irresistible that the legislature bowed to the authority of the court, so far as it was held that it had previously acted in excess of its power, and that otherwise it concluded to adhere to its own judgment as to the best public policy, as it had a right to do. In that, the features thereof mentioned in "b," "c" and "d," now pointed to upon the authority of *State v. Wentler* as either rendering secs. 4382 and 4383 fatally defective or leading to the conclusion that the offense of which the plaintiff in error was charged does not fall under the former, nor the offense of which he was found guilty under the latter, were indorsed by the lawmaking power, with the expressed opinion of this court that it was probably within its power to do so.

Surveying the statutes as a whole, from all that has gone before, features "b," "c," and "d," aforesaid, that once seemed to the court highly unreasonable under the circumstances then existing, do not have such appearance now. Doubtless in making the radical innovation of raising the age of consent from ten to fourteen years the legislature had in mind the construction of the statutes in *Fizell v. State*, and fully appreciated that cases were likely to arise falling within the letter of sec. 4382 where it would be monstrous to charge the offender with being guilty of a crime that might send him to the state's prison in effect for life. The offender might be a mere boy; the female a common prostitute, and there be a concurrence of minds with no very great difference as to the leading spirit. It doubtless was seen by the lawmakers, and they acted having regard for the fact, that cases were liable to arise falling within the letter of such section, where justice would be fully satisfied, or at least punishment would be much more certainly visited upon the offender, and so far as practicable justice would be satisfied

if not fully so, by charging him under the statute on the subject of fornication, or some other statute covering his offense, than by attempting to secure his conviction of the heinous crime of rape. Such attempt, it could be foreseen, under some circumstances might lead to the infliction of a too harsh punishment,—one the very contemplation of which might likely, in view of that supreme equity in the law that puts so much power in trial juries in criminal cases, result in the offender going entirely unpunished. It was also doubtless appreciated that it was impracticable to differentiate as regards the circumstances respecting all cases that might possibly arise, dividing them with some degree of accuracy into classes, and framing acts so that an offense as to one class would not fall under the statute designed to reach another. Raising the age of consent from ten to fourteen years, regardless of circumstances, so as to apply to common prostitutes upon the one hand and mere boys upon the other,—all classes regardless of means used to accomplish the unlawful purpose,—was fraught with many difficulties of a most serious character, among them, as indicated, being the danger that the very severity of the law might in many cases be a stumbling block to the infliction of any punishment in cases calling loudly therefor, unless existing statutes were left undisturbed, with administrative authority lodged somewhere as to which statute was best calculated to cover the given case. Facing those situations, the legislature, presumably with full knowledge of all this court had said on the subject, in its own and superior wisdom has spoken intending to leave the prosecuting officer to exercise the administrative authority mentioned, since this court has held that such must be the result of leaving the statutes in regard to the matter as they were in 1888. They have been so left. That authority is doubtless not unlimited. It cannot be arbitrarily exercised. The trial court must necessarily have supervisory control over it so as to prevent any manifest abuse thereof. With-

out the features referred to, it would still be doubtful whether sec. 4382, providing as it does for a maximum punishment of thirty-five years in the state's prison, and a minimum of five years' imprisonment, would not offend against the constitutional provision condemning cruel and unusual punishments, extended, as it is, so as to include the sexual act between a mere boy and possibly a common prostitute. In this the wisdom of retaining sec. 4580 unchanged, in connection with the amended sec. 4382, is apparent. In some instances falling under the latter, if the charge were so laid, jurors, holding to their own ideas of duty, in extreme cases would not convict.

If anything were needed to re-enforce what has been said as to the legislative attitude, as to a mere attempt, in the sense of physical effort, to have commerce with a female child under the age of consent, regardless of attending circumstances, being an assault to commit the crime of rape, it is furnished by the act of the legislature, sec. 4588*a*. It provides for punishing a person severely, the maximum being imprisonment in the state's prison for a term of two years, for taking indecent liberties with a female under the age of fourteen years, with or without her consent, *there being no intent at the time to commit upon her the crime of rape.* That was further supplemented in 1897 by sec. 4591*a*.

The conclusion must be the legislature supposed that the intent to commit the crime of rape, added to the act made so highly criminal by its last utterance, should satisfy the calls of sec. 4383; and with the former statutes to which we have referred, secs. 4382, 4383, 4580, 4588*a*, and 4591*a*, and other laws incidentally referred to, all standing together, and with the effect we have indicated, would prevent or punish, so far as practicable, abuse or corruption of female children.

5. Did the court err in refusing to give instructions requested by counsel for the accused? Six or more distinct requests made by counsel were refused, all bearing on the

subject of early complaint by the abused female in case of rape, of the offense committed upon her. Such requests were framed upon the theory that actual violence of a hostile character is an essential ingredient of rape upon a female under the age of fourteen, under the statute, and that the usual rule in respect to rape committed upon a female having legal capacity to consent to the sexual act applies to a case like this, where the evidence is undisputed that the girl was an actual participant in the offense. The mere statement of the proposition is sufficient to show its utter absurdity. Such rule has no application whatever to the facts here. The requests were properly refused. Such rule springs from the fact that a female upon whom the crime of rape has been by actual violence committed, will naturally, at the first opportunity, complain thereof to those in her confidence. Ordinary common sense would suggest that where the act of intercourse constitutes rape regardless of consent upon the part of the female because of her statutory disability in that respect, and she not only fails to object or resist, but consents and co-operates, the natural bent of her mind thereafter would be to enable her immoral associate to escape the consequences of his criminal act,—to shield rather than to aid in punishing him. To apply the general rule to such a case would be unreasonable in the highest degree. The trial court very properly instructed the jury to that effect.

6. A female witness who testified to having discovered the accused and the girl while in the act of committing the offense charged, did not disclose her information in regard to the matter for nearly a month. As to her evidence the court was requested to specially instruct the jury that the delay strongly suggested that her evidence given in court was untruthful. Such instruction was properly refused. It would have been plain error to have so instructed. The witness gave a very good explanation of her delay,—one that was consistent with her being a modest, honest woman. We need

not go into the details of her evidence leading to that conclusion. Suffice it to say that, after a careful consideration thereof, it seems her conduct in not promptly informing against the accused was not a circumstance which warranted the court in giving special significance thereto as tending to impeach her. In any event, it would not have been proper to instruct the jury that the delay, of itself, raised a strong presumption of the falsity of her testimony. The most that would have been proper to state under any circumstances, is that the delay was a matter for consideration, with all the other circumstances bearing on the question, in determining the credibility of the witness's evidence. There is no rule that required the court, upon request or otherwise, to do even that. The doctrine as to an early disclosure by a prosecutrix, of the crime of rape committed upon her by force, had no application to the witness. Moreover, it is not the duty of the court, in any case, upon request or otherwise, to single out the evidence of any particular witness and instruct the jury in regard thereto, as to how they should or should not view the same.

Two requests to instruct were refused, which were to the effect that the jury should view the evidence of the girl with great care, having regard for her condition of mind as an injured person, and guard themselves against being moved by sympathy in her behalf, to give undue weight to the evidence against the accused. Here again, counsel's attitude was that the same rule should apply where the female, though competent, is not conscious of having been wronged, where she is really a participant in the unlawful act, which applies in case of the crime of rape committed by actual violence. Obviously the requested instructions were not good law.

Several instructions were refused which were framed upon the theory that although the girl was under the age of legal consent, the accused could not be convicted of the full offense charged, nor with assault with intent to commit such offense,

nor of assault, in the absence of evidence of actual violence toward the girl and subjection of her will. From what has been said no further discussion is necessary to demonstrate that such requests were properly refused.

Complaint is made because the court refused to specially instruct the jury as follows:

"The defendant is entitled to have the evidence against him carefully and closely considered, and can only be convicted if, after such scrutiny, you can say upon your oaths that the evidence leaves upon your minds no reasonable doubt as to his guilt."

We are unable to see how error can be predicated on that, since the court fully instructed the jury that it was their duty to acquit the defendant unless satisfied beyond every reasonable doubt of his guilt in respect to some criminal offense charged against him in the information, and to acquit him of any offense so charged of which they were not from the evidence so satisfied.

7. Numerous instructions were given by the trial court in harmony with the rules of law heretofore discussed, requiring the rejection of counsel's requests for instructions, to the effect that the crime of rape, or assault to commit the crime of rape, cannot be committed upon a female actually consenting thereto, and that the evidentiary rule as to early disclosure by the abused female, of the offense committed upon her, does not apply to one whose consent to the act does not militate against its criminal character by force of the statute. Obviously the court gave the law in that regard to the jury correctly.

The foregoing covers all the propositions urged upon our attention. No reason is perceived why the judgment should be disturbed. It must be affirmed.

By the Court.—So ordered.

BAKER, Plaintiff in error, vs. THE STATE, Defendant in error.

November 21—December 11, 1903.

Criminal law and practice: Obtaining money under false pretenses: Charitable purpose: Information: Allegation of knowledge of falsity: Instructions to jury: Reasonable doubt: "Orphans' asylum": Material misrepresentations: Evidence: Character of accused: Prior criminality: Intent to defraud: Similar misrepresentations: Remoteness: Husband and wife.

1. Sec. 4423, Stats. 1898 (providing that "any person who shall designedly, by false pretenses or by any privy or false token and with intent to defraud, obtain from any other person any money, goods, wares, merchandise, or other property," shall be punished), prohibits and punishes as well the fraudulent obtaining of money or goods for an ostensibly charitable purpose as for any other. *State v. Crowley*, 41 Wis. 271, limited and explained.
2. In such case, an information which, after enumerating the representations claimed to have been made by the accused, alleged that each of such representations was not a fact, "all of which the accused then and there well knew," is *held* a sufficient allegation of knowledge on the part of the accused of the falsity of the statements charged against her.
3. An instruction that "a reasonable doubt which entitles an accused person to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case," taken in connection with the remainder of the charge, is *held* to have conveyed to the jury with sufficient clearness the rule that they must acquit unless the evidence overcomes all reasonable doubt, although the use of the expression "which entitles an accused person to an acquittal" is disapproved. It would be better to instruct in that regard that the doubt should arise from a consideration of all the evidence *or want of evidence.*
4. In a criminal prosecution for obtaining money by falsely representing that the accused was collecting money for an orphan asylum, an instruction to the effect that a boarding house or place where children were taken care of for hire, and in which no element of charity entered, cannot be considered an "orphans' home" as the term would ordinarily be understood by persons who are solicited for charitable donations for the support of such an institution, as qualified in other parts of the charge, is *held* not to have been erroneous.

5. In such case, an instruction that the jury might reach a verdict of conviction if any of the material representations were found to have been made and to be untrue, with the other necessary qualifications, is *held* not to have been erroneous. The false statements established, however, must have been material in the sense that they of themselves, without aid from those which were not proved, induced the accuser to part with his goods or money.
6. In a criminal prosecution the jury have a right to consider the prior criminality of the accused only as bearing on his credibility where he is a witness on his own behalf, but subject to the exception, however, that in cases where a specific intent is an essential element of the crime (such as the intent to defraud in a prosecution for obtaining money under false pretenses), other similar acts so closely connected with that charged as to tend directly to show the intent characterizing the latter may be proved for that purpose.
7. In a prosecution for obtaining money by falsely representing that the accused was collecting money for the support of an orphan asylum maintained by her, evidence of conversations between the accused and two witnesses, which took place in another state some six months before the offense in question, in which she made statements concerning an orphan asylum quite different in detail from, though having some general similarity to, those made to the prosecuting witness, without a showing that such statements were in any way connected with an intent to obtain money from or defraud those to whom they were made, or that the place then maintained by the accused was the same as the one in existence when the alleged offense was committed, and evidence that the place as described in said conversations was materially different from the place the accused actually maintained, is *held* too remote to be admissible as tending to show fraudulent intent.
8. Evidence more or less derogatory to the accused, descriptive of an establishment maintained by her a year and a half before the offense for which she was on trial, and also of an establishment maintained for several months prior to that offense, both establishments being different from that maintained at the time of the offense, is *held* erroneously admitted.
9. Evidence of transactions with and communications from the husband of the accused, not in her presence, the tendency of which was to show a purpose of himself and the accused to apply to their own private accumulations the money obtained by them from contributions for the orphan asylum and not to devote them to the care of the orphans, is *held* inadmissible.

10. Testimony of a witness as to the conduct of herself and others who were soliciting aid for the orphanage of the accused, in the absence of and without anything to show the accused's connection therewith, is inadmissible.

11. Evidence derogatory to the accused, such as admissions that she did not dare to collect money due her from her sister because the latter knew facts to her disadvantage and threatened to expose her, evidence of rumor in the community and recollections of the contents of public records in connection with her marriage, are prejudicial and should have been excluded.

ERROR to review a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

Plaintiff in error was convicted upon an information which alleged that she had feloniously, unlawfully, knowingly, designedly, and with intent to defraud one Alex. Turner, pretended to him that she was a representative and agent of an orphan asylum located at the city of Duluth, known as the "Baker Orphanage;" that Mrs. Phipps was the local representative at Hudson, Wisconsin, of said asylum known as the "Baker Orphanage;" that the same was an institution of the same kind and character as the Dysart Orphanage, located at Ripon, Wisconsin; that it was an institution operated for the care and maintenance of orphaned children, of whom there were then a large number therein being cared for and supported by said asylum; that the management of said orphanage and she (the plaintiff in error) were engaged in finding homes for orphan children, and that she was then collecting money for the support and maintenance of said orphanage, and for the support and maintenance of the orphan children located therein. The information then proceeds to allege that *Mrs. Baker* was not then and there a representative of said orphan asylum, and in that form proceeds to negative the existence of each of the facts alleged to have been represented, closing such negation with the words "all of which she, the said *Mrs. J. S. Baker,* then and there well knew." It also alleges Turner's

belief in the representations, and inducement thereby to give to the plaintiff in error twenty-five cents. To review such conviction, and sentence to pay a fine of $300, and be committed to the county jail until the same be paid, not exceeding five months, the defendant brings this writ of error.

For the plaintiff in error there was a brief by *J. W. Bashford* and *Theo. Buehler,* attorneys, and *Bashford, Aylward & Spensley,* of counsel, and oral argument by *R. M. Bashford.*

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

DODGE, J. 1. The first assignment of error involves the contention that the statute (sec. 4423, Stats. 1898) punishing the obtaining of money under false pretenses applies only to commercial transactions, and is not applicable to the mere inducing of one to donate money as a charity. This contention has support from *People v. Clough,* 17 Wend. 351, which seems not to have been questioned or expressly reaffirmed on this point in New York. The conclusion was reached in that case on the strength of the recitation which preceded the English statute (30 Geo. II, ch. 24) which was the prototype of most of the statutes in this country; the latter, however, not retaining the preamble. That preamble recited as to the wrong to be reached by the statute the obtaining by evil-disposed persons of divers sums of money or merchandise, "to the great injury of industrious families and to the manifest prejudice of trade and credit." From this the New York court argued that such trifling sums as people were ever induced to give to mendicants or for charity were not likely to cause great injury to industrious families, or to prejudice trade and credit. The English courts, in construing their own statute, have never so limited it. *Reg. v. Hensler,* 11 Cox, Cr. Cas. 570; *Reg. v. Jones,* Temp. & M. 270. Nor has any other court, so far as we, or apparently

the counsel, have ascertained, adopted the view of the New York court, which has been repudiated by many of them. *Comm. v. Whitcomb,* 107 Mass. 486; *State v. Matthews,* 91 N. C. 635; *Strong v. State,* 86 Ind. 208; *State v. Styner,* 154 Ind. 131, 56 N. E. 98; 2 Wharton, Cr. Law, § 1153; Bishop, Cr. Law, § 467. It is claimed that this court, in *State v. Crowley,* 41 Wis. 271, has expressly declared its adoption of the rule of *People v. Clough,* and it is true that in that case, at page 284, this court said:

"After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases is supported by the better reason, as well as by the weight of authority, and that it is our duty to adopt it."

That, however, was said not with reference to the point in hand. The question in *State v. Crowley* was merely whether the inducing of one to part with his money, where both were participants in a criminal enterprise and purpose, was within the statute, and it was held that the act was not intended to protect criminals in their unlawful dealings with each other; that being a suggestion also made in *People v. Clough,* and being the basis of decision in all the other New York cases cited. Clearly, that was the rule of the New York cases which this court declared its decision to adopt. We do not deem it controlling upon the present question, which we may therefore consider as an open one in this state.

The language of our statute, adopted *verbatim* from Massachusetts (*State v. Green,* 7 Wis. 676, 685), is general:

"Any person who shall designedly, by false pretenses or by any privy or false token and with intent to defraud, obtain from any other person any money, goods, wares, merchandise, or other property," etc.

The magnitude of the money or property so obtained is of no consequence to the existence of the crime. The turpitude of one who defrauds in the name of charity is at least as great as that of one who meets another at arm's length in the

open field of commercial transactions. Criminal statutes are not so much to protect the individual from injury, as to purge, as far as possible, from the community, the act deemed wrongful and prejudicial. Nor can we concur with the suggestion of the New York court that parsimony and resistance to calls of charity are so strong and effective generally with our people as to make fraud in solicitation for such purposes of but trifling efficacy or danger. We are persuaded not only that the great weight of authority, but the true principle underlying this enactment, requires the holding that it prohibits and punishes as well the fraudulent obtaining of money or goods for an ostensibly charitable purpose as for any other, and that in this respect, at least, the information is not insufficient.

2. It is further contended that the information is insufficient for that it does not clearly allege knowledge on the part of the accused of the falsity of the statements charged against her. The manner of allegation of the falsity of the statements, and of *Mrs. Baker's* knowledge thereof, is set forth in the statement of facts. Confessedly, it is somewhat inartificial, and not the most approved and unambiguous method of asserting that the statements were false, and that the accused knew they were false, and yet we cannot think it reasonably capable of any other significance. To declare that an asserted fact is not the fact cannot fail of declaring the falsity of such assertion, and such declaration is made with reference to each of the representations charged upon accused. The phrase, "all of which she, the said *Mrs. J. S. Baker,* then and there well knew," immediately follows all these negations of fact without break, being separated therefrom merely by a comma. We cannot doubt that she and her counsel were fully informed that the state charged that the various assertions made by her were untrue, and that she knew that the facts so asserted by her did not exist, and that this is sufficient.

3. Several assignments of error are predicated upon the charge to the jury.

(a) Among these was a somewhat peculiarly worded instruction with reference to the Dysart institution, to which accused was claimed to have represented that her orphanage had resemblance. By the evidence it appeared that there never had been any such thing as the Dysart Orphanage at Ripon. The court informed the jury that there never had been such an institution, and then went on to instruct that accused might be convicted under this information if any material representations among those specified in the information were false. Counsel take diametrically different views of the force of this charge; the plaintiff in error assuming that it was an instruction that this assertion, at any rate, was false, and was enough to convict, while the Attorney General understands it as a declaration that this could not be a material misrepresentation, but that, if there were others established, she might nevertheless be convicted. As it will not be material to the result, we only call attention to the ambiguity of the expressions used, as evinced by the differing positions of counsel thereon, to the end that upon another trial such ambiguity may be avoided.

(b) Strenuous criticism is made upon the instruction with reference to reasonable doubt—especially upon the sentence therein, "A reasonable doubt which entitles an accused person to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case." This is claimed to fall within the criticism recently pronounced in *McAllister v. State,* 112 Wis. 496, 500, 88 N. W. 212, and to suggest the idea that evidence must be adduced in the case which arouses a doubt, before the jury are entitled to acquit. It suffices to say that the whole charge, taken together, of which this sentence is merely a part, so completely negatived that idea, and conveyed the contrary one—that the presumption of innocence pervaded the whole trial, and that acquittal must result un-

less that presumption was overcome beyond all reasonable doubt—that it is in no wise obnoxious to what was said in the *McAllister Case.* The vice in the instruction there criticised consisted in the possible suggestion to the jury that conviction was their duty unless they could find from the evidence justification for acquittal, although that justification might consist in a reasonable doubt raised by the evidence. The instruction in this case, taken in whole, made clear that they must acquit unless the evidence overcame all reasonable doubt. The phrase used in the above-quoted sentence, "which entitles an accused person to acquittal," is not of itself to be approved. It may be claimed that it suggests that obstacles must be affirmatively overcome to warrant acquittal. The substituted phraseology used in *Emery v. State,* 101 Wis. 627, 650, 78 N. W. 145, is much preferable, namely, "beyond which guilt must be affirmatively proved in order to justify a verdict of guilty." That preserves the idea that there exists persistently the burden to prove guilt, never the burden to prove innocence. That the doubt must be one arising from a consideration of the whole evidence is an unassailable proposition. *Emery v. State, supra; Butler v. State,* 102 Wis. 364, 369, 78 N. W. 590. That does not mean, however, that any specific or affirmative proof of innocence need be introduced to arouse the doubt. Absence of evidence on some subject may leave the mind reasonably doubtful of guilt. Hence it is well to inform the jury that the doubt should arise from a consideration of all the evidence, *or want of evidence,* though we are not prepared to hold that the absence of such italicized addition is necessarily reversible error.

(c) Further error is assigned upon the definition in the charge of what might constitute an "Orphanage," or "home for orphans," the court saying:

"If the defendant or her husband were maintaining a boarding house, or a place where children were taken care of for hire, and in which no element of charity entered, then

such institution cannot be considered as an orphans' home, as the term would ordinarily be understood by persons who are solicited for charitable donations for the support of such an institution."

This was qualified in other parts of the charge by statements that it was not inconsistent with the existence of an orphanage that money might be paid for the care and nurture of the inmates, or that the persons in charge thereof should receive their expenses and reasonable compensation and emolument for so doing. The concrete question presented is whether some element of charity is essential to the thing described by the accused, according to the information, as an orphan asylum and as the Baker Orphanage. It is, perhaps, possible that an institution might be maintained solely and entirely for profit, the primary purpose of which was to furnish facilities for the care and nurture of children bereaved of parents, just as a hospital for the care of the sick may be maintained upon that theory, and may prove to be profitable to the proprietors. It is hardly conceivable, however, that the proprietors of such an institution would expect the public to make contributions towards its support if informed of its characteristics. Lexicographers are not unanimous, but lean toward a meaning for "orphanage" or "orphan asylum" suggesting destitution of those relieved, rather than a profit-seeking enterprise: Standard Dict.: "Orphanage. An institution for the care of destitute orphans; orphan asylum." Century Dict.: "Orphanage. An institution or home for orphans; orphan asylum; an asylum or home for destitute orphan children." Webster: "Orphanage. An institution or asylum for the care of orphans." Id.: "Asylum. An institution for the protection or relief of some class of destitute, unfortunate, or afflicted persons." We are persuaded that the definition adopted by the trial court accords with the meaning which the words must have had in the context, and under the circumstances where uttered, according to the in-

formation and the evidence of the complaining witness. It is not conceivable but the accused must have used them in the sense of suggesting some measure of charity, and with the expectation that they would be understood in that sense by the hearer. We hold that there was no error in the charge on this subject.

(d) As already stated, the court instructed the jury that they might reach a verdict of conviction if any of the material representations were found to have been made and to be untrue, with the other necessary qualifications. No authority is cited in opposition to the correctness of this rule, which has been entirely approved in this state as to civil cases (*Shaw v. Gilbert,* 111 Wis. 185, 86 N. W. 188), and is supported in criminal prosecutions by *Rex v. Dale,* 7 Carr. & P. 352, and *State v. Mills,* 17 Me. 211. We see no reason why the rules in civil and criminal cases on this subject should differ, except as to the certainty of proof. Of course, it must appear that the false statements which are established were material in the sense that they of themselves, without aid from those which are not proved, induced the accuser to part with his money or goods; else the crime of obtaining goods by false pretenses is not accomplished. We conclude, therefore, that there was no error in this instruction.

4. We now come to the errors assigned upon the admission of evidence, which are very numerous, but not more so than is warranted by the extraordinary flights of inquiry in which the trial court indulged the state's counsel. Much of the objected testimony consisted of narratives of conversations with and conduct of the accused on other and remote occasions, so interlarded with gossipy or scandalous suggestion and innuendo as to indicate the purpose of the witnesses, if not of counsel, to degrade and discredit her in the esteem of the jury. Any such attempt on the part of counsel in the trial of any case, but especially of the attorney for the state in a criminal prosecution, is highly improper, and should be

promptly checked by the trial court. *Barton v. Bruley,* 119 Wis. 326, 96 N. W. 815. One accused has the right to have his guilt or innocence of the particular charge impartially tried by the jury, unprejudiced by any knowledge of his general bad character. This subject has been so recently treated in *Paulson v. State,* 118 Wis. 89, 94 N. W. 771, and *Barton v. Bruley, supra,* that we may forego further remark upon its general aspects. Notwithstanding this general right to immunity from inquiry into previous character, and absolute right against such inquiry for mere purposes of vilification, still the accused sometimes must be subjected to a disclosure of improper or criminal conduct other than that charged, when such disclosure is the incidental and unavoidable result of proving some essential and material fact relevant to the particular issues on trial—as, for example, conviction of another crime may be proved against an accused if he takes the stand as a witness, but merely to affect his credibility. Further than that the jury have no right to consider his prior criminality as bearing on the probability of his commission of the acts charged, though probably they cannot be prevented from so doing, unconsciously if not consciously. In a class of cases where a specific intent is an essential element of the crime, other similar acts so closely connected with that charged as to tend directly to show the intent characterizing the latter may be proved for that purpose. The crime here charged involves, as an essential element, the intent to defraud, and is among that exceptional class. *Mayer v. People,* 80 N. Y. 364. This exception does not open the door to general vilification, however. It is no more proof of the fraudulent intent than of the other elements of the crime that accused is of loose morals or general dishonest tendencies. Whart. Cr. Ev. § 46; *Comm. v. Shepard,* 1 Allen, 575. Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind

to desire that result. The intent charged here is the purpose to mislead Turner into giving money in reliance on supposed, but not existent, facts, known by the accused not to exist. The law permits the inference that one who commits a series of acts bearing close similarity and connection with each other, and clearly evincing a similar intent in each, probably has the same intent in another act of the same nature as, and clearly connected with, such series. *Comm. v. Stone,* 4 Metc. 43; *Weyman v. People,* 4 Hun, 511, affirmed in 62 N. Y. 623; *People v. Molineux,* 168 N. Y. 264, 297, 61 N. E. 286; *State v. Cole,* 19 Wis. 129; *Williamson v. State,* 74 Wis. 263, 42 N. W. 111; Roscoe, Cr. Ev. (11th Eng. ed.) pp. 93, 491. It is under this rule that the state claims admissibility generally for the testimony now under consideration.

A large part of this protested evidence consisted of testimony of two witnesses to conversations with the accused in Minnesota some six months before the offense in which she made statements as to an orphanage maintained by her quite different in details from those made to Turner, though having some general similarity. There is no showing that these statements were in any way connected with an attempt to obtain money from, or otherwise defraud, those to whom they were uttered. There was no showing that the place then maintained by her was the same as that existing April 1, 1902, and later in the trial the contrary expressly appeared. No relationship whatever is suggested between these conversations in Minnesota and that with Turner, except that in both of them the existence of an orphans' home was mentioned, and some description thereof given. This was followed by evidence that the place maintained by accused in October, 1901, was quite different from the description given to these witnesses. We are unable to discover any semblance of connection between these transactions and that charged, especially with reference to the intent. Whatever the intent in the earlier ones—mere boasting or what—it certainly

could not have been that charged to have existed in the interview in April, 1902. By the admission of this evidence the accused was exhibited to the jury as a liar, and was discredited and abased, as she ought not to have been. We deem it altogether remote and inadmissible.

None of the other evidence presented by the assignments of error is even claimed to come within the exception above discussed, permitting proof of other similar transactions in a trial for false pretenses. We will consider it as briefly as we may.

A considerable body of testimony was given in description of an establishment maintained by accused about the autumn of 1900, known as "Sacred Refuge"—all of it more or less derogatory. We are wholly at loss to account for the offer or admission of this evidence, unless, indeed, the court conceived that an orphanage could not be kept by an unsuitable person, and that bad housekeeping at any time tended to show the keeper unfit to maintain an orphanage. It certainly did not tend to prove that the specific statements made by her as to an entirely different establishment in April, 1902, were false. That was the fact charged against her. Admission of this class of evidence was error.

Another very great mass of evidence was offered from numerous witnesses, but especially from one Mrs. Parker, descriptive of the establishment maintained by the accused and her husband at No. 4544 London Road during the months of December, January, February, and perhaps part of March. A great deal of this testimony was derogatory, showing the place to be very badly kept, to be wholly inadequately furnished, and was permeated throughout by suggestion of ill treatment of the few children who were its inmates. It must have been very injurious to the accused, if not properly admissible. A large part of this testimony was given without its appearing whether the establishment referred to was the same maintained by the accused on the 1st

of April, 1902, the time of alleged misrepresentations to Turner; but it finally appeared by one of the state's witnesses that the accused had removed from 4544 London Road, and established herself in a different location on the same street, about the 1st of April, and by another witness that such removal was prior to the 1st of April, and either in March or late in February. There is no evidence tending to show that the last place was either identical with or similar to that kept during the period covered by this testimony. The evidence was objected to on the ground, amongst others, of remoteness. We cannot avoid the conclusion that this objection was well founded. There is no presumption, especially upon a criminal trial, that one who in January had an inadequate establishment at one place also has, after removal to another place, an inadequate and unfit establishment. It is not alleged in the information that *Mrs. Baker* made any representations as to what kind of an establishment she maintained in January, but merely that at the time of her conversation with Turner she had an orphan asylum. If it be conceded that evidence of lack of furnishings, small number of children, charges for their board, inadequate clothing, and the like, go to prove that the establishment was not an orphanage or orphan asylum, within the meaning of those words as used by the accused to Mr. Turner; still this class of evidence had no tendency to show the falsity of the statements made by her as to an institution entirely distinct and separated by a removal and by some period of time from that which the witnesses saw. We must hold that the admission of this class of testimony—especially so much of it as came in after the fact of the removal to the other place appeared—was error.

Two or three witnesses were allowed to testify to transactions with and communications from the defendant's husband, not in her presence, the tendency of which was to show a purpose of himself and wife to apply to their own private

accumulations all moneys obtained by them, and not to devote them to the care of the orphans; also a desire to be secret as to the amounts received. It seems too obvious even to require statement that this was erroneous. If any facts exist within the knowledge of a third person, they must be proved by the testimony of that person, and not as hearsay by those to whom he has made statements; but especially were the statements of the husband inadmissible against the accused, for he could not have been permitted to testify to them. *Carney v. Gleissner,* 58 Wis. 674, 17 N. W. 398.

Some testimony was given by Mrs. Smith as to conduct of herself and others who were soliciting money in Minnesota for this orphanage, in the absence of *Mrs. Baker,* and with which she is not shown to have had any connection. The facts testified to are of very little relevancy, and we might think them nonprejudicial, but the inadmissibility of such evidence is obvious. It is entirely *res inter alios acta.*

Testimony was admitted from different witnesses tending to show circumstances derogatory to the accused—part of it by her own admissions, and part of it by rumors in the community and by recollection of the contents of public records. The more prominent of those subjects were, for example, an admission by *Mrs. Baker* that she did not dare to force her sister to pay over money due her, because that sister knew things to her disadvantage, and threatened to expose her; also that she and her husband, while living together and having a young baby, were rumored in the community not to be married, and that they at first asserted a marriage in Minneapolis, but could not produce certificate, then admitted it to be only a common-law marriage, and then later were formally married, as witness ascertained from a record inspected by him at West Superior. There were other things more or less injurious to the general character of accused and of her husband admitted in evidence, not needing mention in detail. A reference to *Goodwin v. State,* 114 Wis. 318, 90 N. W.

170, *Paulson v. State,* 118 Wis. 89, 94 N. W. 771, and *Barton v. Bruley,* 119 Wis. 326, 96 N. W. 815, must suffice to show not only the error, but the extreme prejudice to the accused from such testimony. There may be doubt whether full exception was reserved to all of these objectionable items of evidence, but enough to constitute reversible error were duly excepted to.

This opinion has already extended to such volume that we feel the very many other assignments of error upon details in the admission of evidence may be passed without express discussion, and left with the expectation that any errors therein will not reappear upon a new trial, conducted in deference to the general suggestions hereinabove contained. Enough errors certainly have already been pointed out to render reversal unavoidable.

By the Court.—Judgment and sentence reversed, and cause remanded for a new trial.

CASES DETERMINED

AT THE

January Term, 1904.

LOWE, Respondent, vs. CONROY, Appellant.

September 29, 1903—January 12, 1904.

Constitutional law: Police power: Health officers: Summary destruction of property: Liability: Quasi-*judicial officers: Court and jury.*

1. The legislature may, under the police power, grant to boards of health authority to employ all necessary means to protect the public health, and may even authorize such bodies immediately and summarily to destroy private property which is in fact a nuisance or source of danger to public health, without a preliminary formal legal proceeding and a judicial trial.
2. The appearance of a malignant and contagious disease, such as anthrax in cattle, is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only be effectually dealt with by the destruction of the animals afflicted.
3. Where *quasi*-judicial officers, such as a health officer or board of health, have summarily destroyed private property on the ground that it constituted a menace or cause of sickness dangerous to public health, the owner thereof may recover its value from the person responsible for its destruction, if such property was not *in fact* such a menace or source of danger, the judgment or discretion vested in such officers being no protection to him, in such a case, for an invasion of the private property rights of others if they have no redress except an action against the officers. *Fath v. Koeppel*, 72 Wis. 289, so far as it conflicts, overruled.
4. Uncontradicted evidence that the defendant, a health officer, made a written order directing the destruction of certain property of the plaintiff, that he gave personal directions to the

deputy health officer and others who actually destroyed the property, and that such persons acted and proceeded under his order and directions, is *held* sufficient to warrant the court in answering in the affirmative a question of the special verdict as to whether the defendant caused the destruction of said property.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Respondent was engaged in the business of conducting a meat market in the city of Neillsville. Appellant is a physician residing there, and was the city physician and health officer. On August 3, 1901, a steer of respondent's herd of cattle on his farm was found sick from an ailment unknown to him, but supposed to have resulted from drinking water containing paris green. He called Dr. Brown, a veterinary surgeon, who gave the steer an antidote for paris green poisoning, but upon further examination informed respondent he believed the steer was afflicted with anthrax, and that another animal of the herd showed symptoms of anthrax. The steer died about eight o'clock in the evening of the same day. Respondent and his son flayed him, then buried the carcass, and placed the hide on others in the basement of his meat market. Dr. Roberts, the state veterinarian, arrived at Neillsville the following morning, and with respondent visited the place where the steer had died. Dr. Roberts procured some blood from the spot pointed out by respondent as the place where the steer had been flayed. This specimen of blood was mounted on microscopic slides by appellant's brother, a doctor at Neillsville, who examined it microscopically, and concluded it contained the bacilli of anthrax. The same slide was thereafter examined microscopically by Dr. Russell, the state bacteriologist, who reported to appellant that, so far as could be ascertained from the examination, the specimen disclosed the presence of the bacilli of anthrax. Appellant was absent from Neillsville August 3d and 4th. Dr. Roberts, the state veterinarian, left Neillsville August

4th, giving directions to appellant's brother to have the herd quarantined until his return. He returned August 7th, vaccinated the herd supposed to have been exposed, repeated this treatment August 19th, and then ordered the quarantine of the herd and pasture removed. On Monday morning, August 5th, appellant returned to Neillsville, was informed of these occurrences, held a consultation with the mayor of the city and chairman of the city board of health and the city attorney; later in the day received instructions from the secretary of the state board of health to destroy any hides which had been exposed, and disinfect the shop and premises if exposed to anthrax infection. Upon this and other information obtained by appellant he believed the steer died from anthrax, and that respondent's shop and some hides and beef in respondent's slaughter house had been exposed to this dangerous and infectious disease. He issued a written order August 5th, and directed Dr. Brown, as deputy health officer, to serve it on respondent. This order notified and directed respondent to remove the hides from the basement of his premises, and destroy them, and the beef of a heifer which respondent and his son had butchered and prepared for the market on the morning after flaying and burying the diseased steer was also to be destroyed. This heifer was the same animal that Dr. Brown had pointed out to respondent as having symptoms of anthrax. Respondent refused to comply with this order, and thereafter on the same day the hides and beef were burned under the supervision of the city mayor, pursuant to the order of August 5th.

It appears that anthrax is one of the most virulent and deadly diseases known to science, and infectious and epidemic in character to a high degree.

Upon the trial the court found that appellant acted in good faith in the discharge of what he deemed his duty as city physician and health officer; that he quarantined respondent's meat market premises; that he had good cause to be-

lieve the basement of the premises was a source of filth and sickness; that he ordered the destruction of the hides and beef which he believed had been exposed to the infection, and that this property was of a value of $239.70. The jury found that the steer was *not in fact* afflicted with any dangerous and contagious disease, and that appellant had no probable cause to believe that the steer was so afflicted. The court ordered judgment in respondent's favor, and awarded him judgment for the value of the hides and beef and for costs.

This is an appeal from that judgment.

S. M. Marsh, for the appellant.

J. E. Wildish and *L. M. Sturdevant,* for the respondent.

SIEBECKER, J. The appellant, as a health officer of the city of Neillsville, seeks to justify the destruction of respondent's property upon the authority vested in the board of health for the adoption of such measures to abate nuisances and remove sources of filth and causes of sickness as may be deemed most effectual to preserve the public health. By sec. 1411, Stats. 1898, it is provided that every town, village, and city board of health "may take such measures and make such rules and regulations as they may deem most effectual for the preservation of the public health. They may appoint as many persons to aid them in the execution of their powers and duties as they may think proper, . . . examine into all nuisances, sources of filth and causes of sickness and make such rules and regulations respecting the same as they may judge necessary for the protection of the public health and safety of the inhabitants." Sec. 1412, Stats. 1898, prescribes as a part of the health officer's duty:

"Upon appearance of any dangerous contagious disease in the territory within the jurisdiction of the board of which he is a member to immediately investigate all the circumstances attendant upon the appearance of such disease," and "at all times promptly to take such measures for the preven-

tion, suppression and control of any such disease as may in his judgment be needful and proper, subject to the approval of the board of which he is a member."

By sec. 1414, Stats. 1898, boards of health are given authority to order nuisances and causes of sickness removed from private property by the owner or occupant, and upon his refusal or neglect to comply the board may cause its removal, and recover the expense thereof.

The common council of the city of Neillsville by ordinances adopted these provisions as a part of the regulations for the preservation of the public health, and provided for the organization of the board of health, prescribing the duties of the board and its health officer in carrying out the powers and duties imposed by law. Neither the statutes nor the ordinances of the city for the preservation of the public health make provision for a hearing before the board or otherwise of the person charged with maintaining a nuisance, source of filth, or cause of sickness. The board or its members or officers may abate and remove the nuisance, source of filth, or cause of sickness without any such hearing, even though such proceeding necessitates the destruction of private property.

The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life. Under such circumstances it has been held that the legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health, and, if necessary, go to the extent of destroying private property when the emergency demands. *Bittenhaus v. Johnston,* 92 Wis. 588, 66 N. W. 805; *Salem v. E. R. Co.* 98 Mass. 431; *Lawton v. Steele,* 119 N. Y. 226, 23 N. E. 878; *S. C.* 152 U. S. 133, 14 Sup. Ct. 499. The power to summarily abate nuisances

was fully recognized and established as a principle of the common law, upon the ground that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be attained. Within this principle, "quarantine and health laws have been enacted from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality." *Lawton v. Steele, supra; Sentell v. N. O. & C. R. Co.* 166 U. S. 698, 17 Sup. Ct. 693; *Hart v. Mayor,* 9 Wend. 571; *Health Dept. v. Rector,* 145 N. Y. 32, 39 N. E. 833; *Rockwell v. Nearing,* 35 N. Y. 308.

The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only in many instances be effectually dealt with by the destruction of the animals afflicted.

Respondent insists that he has the legal right to recover his damages since the property was not in fact a nuisance, source of filth, or a cause of sickness, as contemplated by the statute for the preservation and protection of the public health. This presents the inquiry whether the determination of the health officers that a nuisance or cause of sickness dangerous to health in fact existed is a final determination, binding upon respondent as owner of the property which the health officer decided must be destroyed in order to abate the nuisance and remove the cause of sickness.

The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes of the law—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger

to health—yet it is no protection for destroying private property which *in fact* is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property can be adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether *in fact* he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it. In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the conditions which the statutes declare they may abate or remove. *Hutton v. Camden,* 39 N. J. Law, 122; *Lawton v. Steele, supra; Cole v. Kegler,* 64 Iowa, 59, 19 N. W. 843; *People ex rel. Copcutt v. Board of Health,* 140 N. Y. 1, 35 N. E. 320; *Health Dept. v. Rector,* 145 N. Y. 32, 39 N. E. 833, and cases; *Orlando v. Pragg,* 31 Fla. 111, 12 South. 368.

It is urged that no action can be maintained to charge appellant for the value of the property because in ordering its removal and destruction he was in the exercise of his official duty as city health officer. The laws for the preservation of the public health make no provision for the payment of property so destroyed by mistake on the order of health officers. The question then arises, Who is liable for the value of this property under the facts and circumstances of this case?

The jury found that the steer was not afflicted with a contagion, and that the beef and hides destroyed were not in-

fected with anthrax. It is clear that the city is not liable under the decisions of this court. In the case of *Kempster v. Milwaukee,* 103 Wis. 421, 79 N. W. 411, it is said:

"In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefit or pecuniary advantage in its corporate or private capacity. *Hayes v. Oshkosh,* 33 Wis. 314, and cases cited."

As here indicated, under the laws of this state no liability on the part of a municipality arises for injuries resulting from the acts or default of its officers while performing a duty imposed upon it as a governmental agency for the public at large. *Durkee v. Kenosha,* 59 Wis. 123, 17 N. W. 677; *Folk v. Milwaukee,* 108 Wis. 359, 84 N. W. 420.

Appellant contends that he is not liable in this action upon the ground that the powers vested in members and officers of a board of health are discretionary in character, and that the duty of determining what are causes of sickness affecting the public health are *quasi*-judicial in character. The acts of appellant, as appears from the above statement of facts, were within the scope of his duty as health officer, and come within the class of *quasi*-judicial acts. It is the general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption. Dillon, Mun. Corp. § 277, and note; *Steele v. Dunham,* 26 Wis. 393; *Druecker v. Salomon,* 21 Wis. 621; *Smith v. Gould,* 61 Wis. 31, 20 N. W. 369; *Gates v. Young,* 82 Wis. 272, 52 N. W. 178. The facts and circumstances show, however, that respondent's private property rights have been unjustifiably invaded, and that he will be remediless in the

law, unless it be that appellant and those who actually committed the trespass in wrongfully destroying his property are liable. Under such circumstances *quasi*-judicial officers have been held liable to respond in damages upon the ground that the exercise of this discretion is limited by the superior right guaranteeing to every person immunity from having his private property rights invaded except under the regular course of law, sanctioned by the established customs and usages of the courts. The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law affords no redress other than an action against the one actually committing the trespass. *Hubbell v. Goodrich,* 37 Wis. 84; *Houston v. State,* 98 Wis. 481, 74 N. W. 111; *Cubit v. O'Dett,* 51 Mich. 347, 16 N. W. 679; *Miller v. Horton,* 152 Mass. 541, 26 N. E. 100; *Pearson v. Zehr,* 138 Ill. 48, 29 N. E. 854; *McCord v. High,* 24 Iowa, 336. The circuit court proceeded upon this principle, and held appellant liable in damages resulting from the destruction of the property, because it was *not in fact* a nuisance or cause of sickness endangering the public health. This course is assailed by appellant upon the authority of *Fath v. Koeppel,* 72 Wis. 289, 39 N. W. 539. This was an action against the defendant, as meat inspector of the city of Milwaukee, for the destruction of a quantity of fish as unwholesome for food. The action was upon the ground that his acts were without authority, but the court held that he had authority to inspect fish, and judge whether they were a proper article of diet, and to destroy them if he found they were unwholesome. It is stated in the opinion:

"He is vested with the power to determine the quality and healthfulness of fish in the market, and, if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, . . . and the officer exercising such a power is within the protection of that principle that a judicial officer is not responsible in an action for

damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act or render it, if he acts within his jurisdiction"—citing, among the authorities in support of this proposition, *Raymond v. Fish,* 51 Conn. 80.

The decision arose on demurrer, and seems to assume that the fish destroyed were *in fact* unwholesome, and not a fit article of diet. Under this assumption *of fact* the decision was in accord with the doctrine that health officers are not liable in damages for destroying property when such property is *in fact* a source of danger to the public health. The opinion, however, seems to go upon the ground that such *quasi*-judicial officers are under all circumstances absolutely protected from liability to the owner of the property, and are entitled to the same protection as an officer of a judicial tribunal in the discharge of official action within his jurisdiction. This is not the rule established under the adjudications. Upon the authorities cited and the reason advanced therein the rule is:

"Inasmuch as the law quite universally protects private property, . . . the judgment or discretion of a *quasi*-judicial officer, though exercised honestly and in good faith, does not protect him where, by virtue of it, he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer." Mechem, Public Officers, § 642, and cases cited.

In so far as *Fath v. Koeppel, supra,* is in conflict with this conclusion, it must be deemed overruled.

Appellant assigns error upon numerous rulings of the trial court in admitting testimony over his objection and rejecting testimony offered by him. We have examined every exception brought to our attention, and find the court's rulings are correct. Many of the exceptions urged are immaterial under the final disposition of the questions litigated and the grounds upon which judgment was awarded.

It is contended the court erred in answering the following

question in the special verdict: "Did the defendant cause the destruction of the hides and beef?" The court answered it in the affirmative. An examination of the evidence shows there was no conflict as to the fact that appellant made the written order directing the destruction of the hides and beef, that he gave personal directions and instructions to the deputy health officer and others who actually destroyed the property, and that these persons acted and proceeded under his order and direction. This fully establishes the grounds which justify this answer to the question.

The evidence adduced fully sustains the findings of the jury. Upon the grounds stated, respondent was entitled to a judgment for the value of the property destroyed.

By the Court.—The judgment of the circuit court is affirmed.

KRONSHAGE and others, Executors, Appellants, vs. VARRELL and others, Respondents.

November 19, 1903—January 12, 1904.

Wills: Bequest to charity: Class of beneficiaries: Charitable use.

A testator, after reciting that "having in mind the *many catastrophies resulting from the action of the elements and the great suffering, distress, famine and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes*, and having a desire to do what I can to relieve the same," bequeathed to trustees a certain part of his estate to be invested and the income annually expended for the charitable purpose of "relieving the wants, distress, and suffering arising from *such* causes, and for the purpose of aiding and assisting . . . the victims of *such* accidents and catastrophies." The testator further recited that he placed no restriction upon the trustees as to the locality where said moneys should be expended, but enjoined them "to select subjects worthy of assistance" and to use their best judgment and

prudence in so handling and disbursing said moneys that the same "may be of the greatest possible benefit to suffering humanity." *Held:*

(1) That the bequest was not to charity generally, but defined a class of beneficiaries with such definiteness as would enable the court to determine whether any concrete expenditure was within the scheme of the testator.

(2) That the terms of the bequest did not vest in the trustees discretion to disburse the income to individuals subjected merely to some property loss from some of the defined causes, who were not in pecuniary need and not subjects of public charity, but their discretion was restricted to those subjects fairly entitled to relief in effectuating the testator's general motive and purpose as declared in the bequest.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

Action brought by the executors for the construction of the will of John W. Varrell, deceased. That will disposed of an estate of $60,000 or more, directing that the same be all reduced to money, and that certain legacies be paid therefrom, leaving a residue of something more than $15,000. With reference to that he made the following provision by paragraph 22:

"Having in mind the many catastrophes resulting from the actions of the elements and the great suffering, distress, famine and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes, and having a desire to do what I can to relieve the same, I therefore give and bequeath to *Th. Kronshage, Emil O. Spiegelberg,* and *Will H. Pittman,* in trust, all the rest, residue and remainder of my estate being cash, and direct that the same shall be invested by them as a trust fund, in such securities as they shall in their best judgment consider safe and remunerative, and that my said trustees shall annually expend the whole, or such part of the interest, revenues, and profits arising from the investment of such trust fund for the charitable purpose of relieving the wants, distress, and suffering arising from such causes, and for the purpose of aiding and assisting to such extent as lies within their power and as they may deem advisable the victims of

such accidents and catastrophes. I place no restriction upon my said trustees as to the locality where they shall expend such moneys or give such aid, but I hereby enjoin them to select subjects worthy of assistance, and that they use their best judgment and prudence in so handling and disbursing the money hereby confided to their management and control, so that the same may be of the greatest possible benefit to suffering humanity."

That was the only portion of the will assailed or questioned. The court held it void as too indefinite and general to enable the enforcement of any trust.

From judgment in accordance with that holding, the plaintiffs bring this appeal.

Platt Whitman and *W. E. Howe,* for the appellants, to the point that the language of the bequest was sufficiently definite as to the class of beneficiaries to be benefited, cited *Harris v. Allen,* 78 Ind. 100, 41 Am. Rep. 555; *Miller v. Porter,* 53 Pa. St. 292; *Jones v. Habersham,* 107 U. S. 174; *Rush Co. Comm'rs v. Dinwiddie,* 139 Ind. 128; *Leeds v. Shaw,* 82 Ky. 79; *Suter v. Hilliard,* 132 Mass. 412; *Bullard v. Chandler,* 149 Mass. 532; *Phillips v. Harrow,* 93 Iowa, 92; *Sweeney v. Sampson,* 5 Ind. 465; *Rotch v. Emerson,* 105 Mass. 431; *Doyle v. Whalen,* 87 Me. 414; *Quinn v. Shields,* 62 Iowa, 129.

For the respondents *McLimans* and others there was a brief by *Ed. M. Lowry, Bushnell & Moses* and *J. J. Blaine;* for the respondent *Eunice B. Varrell* and another there was a brief by *Fethers, Jeffris & Mouat;* and the cause was argued orally by *A. R. Bushnell, O. H. Fethers* and *M. O. Mouat.*

Dodge, J. The degree of definiteness essential to the validity of any grant in trust for charity is a subject so recently treated at large, and as to which our attitude is so unambiguously declared in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, that we cannot justify extended review of

either its history or of the writings of authors or judges upon it generally. This court has decided, disregarding the reasons which some others have deemed controlling, that there are inherent in our courts all the strictly judicial powers ever exercised by the Chancellor or the High Court of Chancery of England to find means to carry into effect a charitable purpose entertained by a testator or grantor; that such courts lack only the prerogative *cy pres* power enjoyed by the sovereign to apply all goods devised to any charitable purpose, to purposes never declared or even entertained by the donor, under certain circumstances, which prerogative power was in some degree exercised by the Chancellor by delegation from the sovereign. All that is necessary is that the devisor shall place his property in trust, and designate a charitable purpose of his own narrower than the field of charity generally. The courts can and will then see to it that a trustee is provided, if none be designated, and that means will be found to apply the property to the purpose, if no method be prescribed. They are limited to the defined purpose, and they must ascertain it from the words of the testator, but in ascertaining it may and will indulge the most liberal construction. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786.

Those who assail the bequest now presented for construction do not seriously contend but that, if the testator has limited his donation to an ascertainable class of beneficiaries, it may be valid, if charitable; though perhaps they do not fully concede that position. The burden of their argument is addressed to the contention that no limits are prescribed; that the later sentences, in context with the whole, declare the will and purpose of the testator merely that his donation be expended, in the discretion of the trustees, for the benefit of suffering humanity. If that construction must be adopted, we should find it difficult, indeed, to avoid the conclusion that this will presented a donation to charity generally, with

no class selected or scheme prescribed by the donor, so that it could be given practical effect only by the exercise of the prerogative *cy pres* power to select both a class of beneficiaries and a scheme of distribution of benefits. The question, then, is one of construction. What did the testator mean?

As has often been said, precedents are useful only slightly, or not at all, upon questions of construction. *Swarthout v. Swarthout,* 111 Wis. 102, 108, 86 N. W. 558; *Lawrence v. Barber,* 116 Wis. 294, 306, 93 N. W. 30. Arguments are hardly more so. The reader of the words has no test but his own understanding of them from which to judge of the meaning intended to be conveyed by the writer. After applying that test, we cannot bring ourselves to respondents' view of the testator's meaning. We cannot ignore his declaration that he is moved to make the bequest by the desire to relieve to some extent against the "many catastrophes resulting from the actions of the elements and the great suffering, distress, famine, and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes." Nor can we pass as meaningless his command that the revenues of the trust fund be expended "for the charitable purpose of relieving the wants, distress, and suffering arising from *such* causes," and assisting "the victims of *such* accidents and catastrophes." Can it be doubted that the testator intended by the word "such" to limit the relief to sufferers from some causes, accidents, or catastrophes, as distinguished from others not within his mental category? We think not. Certainly he intended that some causes, some accidents and catastrophes, should be excluded from those whose victims were to be the subjects of the annual expenditures of the income of this fund. If so, then is it not possible for the court to find some line of differentiation which was in the mind of the testator, with sufficient certainty and definiteness to enable it to decide, in any concrete instance of ex-

penditure or proposed expenditure, whether it is authorized? We are convinced that it is possible.

Obviously the purchase of food for the homeless victims of the New Richmond cyclone would be justified. We think it equally obvious that expenditure to aid the cure of consumptives or inebriates would be forbidden to the trustees. Whether famine sufferers of a drouth-stricken region might be relieved, would perhaps be a question of more doubt than either of the other two, for they would not be victims of storm, fire, or flood. The inquiry therefore would be whether drouth was a "natural cause" so similar in character or results to those specified that we must conclude the testator had it generically in mind in enlarging the field otherwise limited by the three expressed causes. We must presume that he had in mind a class of causes illustrated by the three named, though not strictly confined to them, but similar enough to be within the same general conception of possible suffering which he desired to relieve. Such is the unavoidable force and significance of the words used.

In the light of such a presumption it cannot be impossible for a court to decide with reasonable certainty whether a given cause was within or outside the mental conception of the testator as declared in those words. We are persuaded that a satisfactory conclusion could be reached in any of the three foregoing illustrations, and that one at least would fall outside of that conception, and would not authorize the expenditure of any of the trust-fund income. If that be so, and any specific use, clearly charitable, is excluded from the field of expenditure limited by the will, then to a demonstration the donation is not to charity generally, and without limit, and does not fail of the definiteness required for its support. This view by no means ignores or nullifies the final injunction that the trustees use their best judgment in so handling and disbursing the fund that it "may be of

the greatest benefit to suffering humanity." 'Any—even a single—instance of relief accorded to any sufferer is a benefit to suffering humanity, and it is entirely consistent that a testator, after limiting either the field or the recipients of his beneficence, should enjoin upon its administrators diligence to so apply it within that field, or to those persons, as to accomplish the utmost relief to the sum of human suffering.

In this connection it is urged by appellants that the injunction "to select subjects [persons] worthy of assistance" is a limitation of itself, so that, even if the trustees were authorized to select them from the entire field of charity, the beneficiaries would still constitute a class outside of which would fall the unworthy, narrower therefore than charity generally, which a court might ascertain and protect against misapplication of the fund to others. Inasmuch as we have already found a limit to the testator's charitable purpose otherwise, we need not pass upon the force of this contention, which doubtless has support from some decided cases.

Another objection urged against this bequest is that the uses are not all charitable and public, but that disbursement of the income may be made by the trustees, in their discretion, to individuals subjected merely to some measure of property loss from some of the defined causes, who are not in pecuniary need, and not subjects of public charity; and that thus the entire bounty of the testator may be diverted to mere private beneficence and liberality, having no necessary element of public charity to arouse the power of a court of equity. If such be the authority vested in the trustees, the objection is weighty, and might well defeat the trust, even in those jurisdictions which acknowledge not only the broadest of judicial powers, but the prerogative *cy pres* power as well. *Morice v. Bishop of Durham,* 9 Ves. Jr. 399; *S. C.* with note, 5 Eng. Rul. Cas. 575; Tudor, Char. Trusts (3d Eng. ed.) 36; *Kent v. Dunham,* 142 Mass. 216, 7 N. E. 730.

Of course, insurance against mere losses is not necessarily charity. Here again, however, becomes significant the duty of courts to extend the most liberal construction reasonable to the words of a donor in order to find and sustain a valid charitable gift. Well within the limits of such reasonable construction we think is found declared the testator's intent that his bounty be distributed to the furnishing of aid and relief of such character and to so broad a class of so indefinite individuals that the general public are benefited by and interested in its due execution. The motive of the testator is declared to be to relieve "suffering, distress, famine, and want" arising from certain causes. He enjoins upon his trustees that they select "subjects worthy of assistance," so that the money be of benefit to "suffering" humanity. This injunction is obviously restrictive of the discretion otherwise vested in these trustees. We are satisfied that the testator meant by such restriction to confine his bounty to those subjects fairly entitled to relief in effectuating his general motive and purpose already declared; not necessarily to paupers, for the wealthy man, in common with the indigent, may, as the result of some of the suggested casualties, be in peril of starvation or of perishing from cold unless aid be promptly rendered, and may be equally a member of a class worthy of public and charitable relief during the emergency when money is useless in absence of opportunity to purchase the needed supplies. The word "worthy," adopted by the testator, is fairly expressive of this view. It is elastic in its meaning, according to the context in which used. It may—perhaps, more exactly, does—mean virtuous, or of good standing, but its restriction to such significance would be absurd in the present connection; would strain through a distorting filter this testator's bounty, in view of the situations which he evidently contemplated as likely to surround its distribution. Charity is defined by Lord CAMDEN as a "gift to a general public use which extends to the poor as well as

the rich." *Jones v. Williams,* Amb. 651; *Perin v. Carey,* 24 How. 465.

"The immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity." *Harrington v. Pier,* 105 Wis. 521, 82 N. W. 357.

We are convinced that the testator intended, and by reasonable construction of his words has declared, that this fund be applied and confined to such a use. Our conclusion is that neither of the objections raised to the bequest in question is fatal, but that it is valid, and the residue of the estate should be distributed to the trustees named, upon the trusts declared by the residuary paragraph above quoted.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment decreeing the will presented valid, inclusive of the bequest contained in the twenty-second paragraph thereof, the taxable costs of both parties in this court to be paid out of the estate.

CASSODAY, C. J., dissents.

BADGER TELEPHONE COMPANY, Respondent, vs. WOLF RIVER TELEPHONE COMPANY, Appellant.

November 20, 1903—January 12, 1904.

Trials: Election between counts: Immaterial error: Corporations: Sales: Telephone companies: Statute of frauds: Estoppel: Authority of officer.

1. In an action by one telephone company against another to recover the value of the plant of the former alleged to have been sold to the latter, it is not error to refuse to require the plaintiff to elect whether it will go to trial upon a count based upon *quantum meruit,* or upon a count alleging that defendant

agreed to make payment therefor in a certain number of shares of its capital stock, and that it had failed and refused to deliver such stock, or pay the value thereof in cash.

2. Where a verdict is properly directed in favor of the plaintiff upon evidence properly in the case, the defendant is not prejudiced by the admission or retention of improper evidence.
3. Where property, for the purchase price of which action is brought, has been delivered to the defendant by the plaintiff more than two years before the commencement of the action, and the defendant has received the same and appropriated it to its own use, the defense that the contract of sale was void under the statute of frauds cannot be maintained.
4. Under secs. 1775 and 1775*a*, Stats. 1898, one telephone company may take, own, hold and enjoy any right, privilege, or franchise theretofore owned by another such company.
5. Where possession of the property of one corporation had been fully delivered to and received and accepted by another, which retained the property and had the use thereof for years, the latter, in an action against it to recover the value of such property, is estopped from claiming any want of authority in the board of directors of the former to make the transfer through one of its officers.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was commenced January 31, 1902, to recover $1,500, the alleged purchase price of a telephone exchange and its franchise in Waupaca, and all posts, poles, wires, telephones, and other apparatus connected therewith, and other property described, sold and delivered by the plaintiff to the defendant, at its request, January 18, 1900, then and there reasonably worth $1,500, and which amount the defendant then and there agreed to pay therefor, but no part of which had been paid. In a separate count the complaint alleges that the defendant then and there agreed that, in consideration of the property so sold and delivered to the defendant by the plaintiff, the defendant would execute and deliver to the plaintiff, or to such party as the plaintiff should designate, thirty shares of the capital stock of the defendant corporation, of the par value of $50 each, amounting to $1,500,

and that the same then and there had an actual value of $1,500; that, although the defendant had actually received and held possession of the property so purchased by it from the plaintiff, yet the defendant, though often requested, had neglected and refused to transfer to the plaintiff such stock as so agreed, and had continued to so refuse, or to pay to the plaintiff the cash value of the stock. The defendant answered by way of a general denial, and also set up a counterclaim of $300 damages for an alleged breach of a written contract executed January 15, 1896, in regard to building a telephone exchange between Waupaca and Weyauwega. The plaintiff replied to the counterclaim.

At the close of all the testimony, the defendant, in open court, abandoned all claim to any affirmative relief on its counterclaim, and moved the court to direct a verdict in favor of the defendant upon grounds stated, but which was denied by the court. Thereupon the court, on motion of the plaintiff, directed the jury to find a verdict in favor of the plaintiff, and assess its damages at $1,500, which the jury did accordingly. Thereupon judgment was entered upon such verdict in favor of the plaintiff for the amount stated, with costs and disbursements, taxed at $89.01.

From the judgment entered thereon for such damages and costs, the defendant appeals.

Charles M. Sanborn and *Wilbur E. Hurlbut,* for the appellant.

John J. Wood, Jr., for the respondent.

CASSODAY, C. J. We perceive no reversible error in refusing to compel the plaintiff to elect which count it would go to trial upon. The only difference in the two counts is that in the one it is alleged that the property sold to the defendant was reasonably worth $1,500, which the defendant then and there agreed to pay therefor, and in the other that the defendant agreed to make such payment therefor in thirty-

shares of the capital stock of the defendant corporation, of the par value of $50 each, amounting to $1,500, and then and there having an actual value of $1,500, and that the defendant had failed and refused to transfer and deliver the stock, or to pay to the plaintiff the value thereof in cash. They both arise out of the same transaction, and in fact the same contract, and seem to satisfy all the requirements of the statutes. Sec. 2647, Stats. 1898; *Beers v. Kuehn,* 84 Wis. 33, 54 N. W. 109; *Reindl v. Heath,* 109 Wis. 570, 85 N. W. 495.

A number of errors are assigned for the improper admission of testimony and the refusal to strike out testimony. The question here presented is whether the verdict was properly directed in favor of the plaintiff. If the evidence, properly admitted, was sufficient to take the case to the jury, then the judgment must be reversed, regardless of the question whether any evidence was improperly admitted or retained. If the verdict was properly directed in favor of the plaintiff, upon evidence properly in the case, then the defendant was in no way prejudiced by the admission or retention of improper testimony.

It is undisputed that in December, 1899, the plaintiff was the owner and in possession of the telephone exchange, franchise, posts, poles, wires, telephones, and other apparatus mentioned in the complaint; that at that time one John Boyson was a director and the vice-president and treasurer of that company, and had for a considerable time been the managing agent for the plaintiff's board of directors in the control and management of said property, and was orally authorized by the other directors of that company to sell and dispose of all such property. One A. L. Hutchinson testified to the effect that he was the treasurer, director, and general manager of the defendant company; that the two companies had exchanged business up to December, 1899; that he conversed with Boyson at different times in the latter part of December, 1899, and the forepart of January, 1900, in re-

gard to the terms upon which the plaintiff would sell and dispose of its properties; that he did so for the purpose of getting the proposition before the defendant's directors at their annual meeting January 18, 1900; that John Boyson, representing the plaintiff, was present at that meeting with the defendant's president, secretary, and treasurer, and other directors; that the substance of the conversation was that the plaintiff would sell its part of the toll line between Weyauwega and Waupaca—the toll line from Waupaca to Poysippi by way of Veteran's Home and Pine River, and exchange and franchise in Waupaca; and that "the terms of the proposed purchase were agreed to;" that the terms agreed upon "at that time were to be put in writing and signed by the officers of the two companies;" that he "was to prepare the writing, and did so;" and two copies of the same were identified by the witness and in evidence. They are both dated January 18, 1900, and appear to be substantial duplicates of each other, except that the one signed by the president and secretary of the plaintiff contained, near the end and just before the attestation, this clause: "The said *Badger Telephone Company* is to have free use of the line between Poysippi and Pine River and the second party to make and keep connections suitable for same purpose;" whereas that clause was not in the one signed by the president of the defendant, but was on a rider or paster attached thereto. That agreement is to the effect that, for the consideration thereinafter mentioned, the plaintiff thereby sold, released, and transferred to the defendant the property described, to have and to hold forever, and thereby agreed to warrant and defend the defendant against any and all claims then existing against the plaintiff; and the defendant therein agreed to execute and deliver to the plaintiff, or such person as it might designate, thirty shares of the capital stock of the defendant company, of the par value of $50 each, amounting to $1,500, the same to be delivered at the time of executing the contract. The

stock certificate bears the same date, and was signed by the defendant's president and secretary, and is to the effect stated.

There appears to have been some controversy as to whether the contents of the slip or paster so attached to the contract were to be a part thereof, and as to whether it should be written in the contract, or left so attached. The matter of exchanging such contract in duplicate appears to have been delayed until June 14, 1901, when the plaintiff requested the defendant to sign the contract, with the contents of the slip or paster written therein, but which the defendant, a week afterwards, refused to do. In July, 1901, the plaintiff demanded a settlement from the defendant for the property so sold and delivered to it. The defendant refused to do so by reason of the plaintiff's delay, and its final refusal to sign the contract with the contents of the slip or paster left out, and for the further reason that the plaintiff had failed to keep and perform the contract of 1896 alleged in the defendant's answer. It is undisputed that immediately after the proposed written contract was drawn by Hutchinson, January 18, 1900, all the operators of the property were directed to turn the same over to the defendant. Hutchinson testified in behalf of the defendant that the result of the conversation between Boyson and the defendant's board of directors, January 18 or 19, 1900, was that the defendant should take possession at once; that he was to notify the officers and agents of the plaintiff that the defendant had bought the property and was to take possession at once and begin to receive the tolls; that the contract was closed, and, as general manager, he sent out notices to that effect; that he sent circular letters to such different operators to the effect that the property had been transferred to the defendant, and that thereafter all remittances should be made to the defendant; that such remittances were thereafter made to the defendant; that during the summer of 1900 the defendant wrote letters to different patrons, agreeing to repair different parts of the property so

transferred to it; and that he supposed the contract to have been consummated until informed differently the last of August, 1900.

Thus it appears from the undisputed evidence that on or about January 19, 1900, the property in question was delivered by the plaintiff to the defendant, and the defendant received and accepted the same, and appropriated the same to its own use. This being so, there is no ground for claiming that the transfer was void under the statute of frauds (sec. 2308, Stats. 1898). *Mason v. H. Whitbeck Co.* 35 Wis. 164; *Bank of River Falls v. German Am. Ins. Co.* 72 Wis. 535, 40 N. W. 506; *Pratt v. Peck,* 70 Wis. 620, 36 N. W. 410; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 128, 81 N. W. 136. Under our statute the defendant was authorized to take and acquire by purchase or assignment, and thereafter own, hold, and enjoy, any right, privilege, or franchise theretofore owned by the plaintiff. Secs. 1775, 1775*a,* Stats. 1898; *State ex rel. Badger I. Co. v. Anderson,* 97 Wis. 114, 72 N. W. 386. As indicated, the possession of the property was fully delivered to, and received and accepted by, the defendant. The defendant retained such possession and had the use and benefit thereof for years, and converted a portion thereof to its own use. These facts are undisputed, and, being so, the defendant is estopped from claiming any want of authority in the plaintiff's board of directors to make the transfer through its vice-president, treasurer, and director, Boyson. In view of the admitted facts and circumstances mentioned, it may be fairly presumed that even the stockholders of the respective corporations acquiesced in, if they did not expressly authorize or ratify, the transfer of the property in question. *Marvin v. Anderson,* 111 Wis. 392, 393, 87 N. W. 226, and cases there cited; *Consolidated W. P. Co. v. Nash,* 109 Wis. 497, 85 N. W. 485; 2 Cook, Stock & Stockholders (3d ed.) §§ 728–733. It is undisputed that before the commencement of this action the plaintiff demanded a

transfer of the stock in settlement for the property so transferred. The defendant's witness, Hutchinson, testified to the effect that the defendant was to pay for the property by issuing thirty shares of stock at $50 a share; that defendant made out the certificate of stock, but never delivered it; that that stock was worth par at the time of the agreement—$1,500 in cash; and that it has not been worth less at any time since.

We must hold that the verdict was properly directed in favor of the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

ZIPP MANUFACTURING COMPANY, Respondent, vs. PASTORINO and others, Appellants.

December 11, 1903—January 12, 1904.

Sale of chattels: Opportunity for test: Use of unnecessary quantity.

Where goods are sold under an agreement that they may be returned if, upon fair test, they do not prove satisfactory, the purchaser, in making the test, can use such quantity only as is fairly and reasonably necessary to determine their quality, and if he uses more than such quantity he makes the goods his own and loses the right of rejection.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the appellants there was a brief by *Roemer & Aarons,* and oral argument by *C. L. Aarons.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *W. D. Hickman.*

WINSLOW, J. This is an action to recover the purchase price of a barrel of vanilla sold by the plaintiff to the defend-

ants, who were wholesale manufacturers of candy, under an agreement that if, upon fair test, it did not prove satisfactory it might be returned. The defense was that the vanilla was of poor quality and proved unsatisfactory upon a test being made, and was returned. A verdict for the plaintiff was directed on the ground that the evidence showed without dispute that the defendants had accepted the vanilla by using in their business a far larger amount than was reasonably necessary for testing purposes. Examination of the evidence shows that the direction was plainly right. It appeared without dispute that a satisfactory test could be made by the use of a few ounces; also that the defendants used from four to six ounces daily in the manufacture of candy for a period of more than six weeks, during which time they made and sold about three tons of candy flavored with the vanilla, although by their own admissions they discovered that it was not satisfactory after making the first test. For testing purposes they could only use such quantity as was fairly and reasonably necessary to determine its quality. *Cream City G. Co. v. Friedlander,* 84 Wis. 53, 54 N. W. 28. When they went beyond this, as they unquestionably did in this case, they made it their own, and lost the right of rejection.

By the Court.—Judgment affirmed.

GRAF, Respondent, vs. LAEV, Appellant.

December 12, 1903—January 12, 1904.

Contracts: Architects: Instructions to jury: Mitigation of damages: Burden of proof: Tender of performance.

1. In an action to recover for the services of an architect, the terms of the contract under which they were rendered being in dispute, the court instructed the jury that they could not find for the plaintiff unless they were satisfied by a preponderance of

the evidence that the contract *was in all respects* as claimed by the plaintiff, and that if they were not so satisfied or were satisfied that the minds of the parties did not meet as to the portions of the contract in dispute, they should find for the defendant. *Held*, that a refusal to instruct, in effect, that if the jury should find the contract to be as claimed by the defendant the plaintiff could not recover, was not error.

2. Where, in an action to recover for personal services, such as an architect's, the evidence shows part performance by plaintiff, and a willingness to perform the remainder, which was prevented by defendant, the plaintiff is entitled to recover the full contract price, in the absence of evidence that the plaintiff might have obtained employment elsewhere, or of any fact in mitigation of damages.
3. In such case, the burden of proving mitigation of damages is on the defendant.
4. Evidence, among other things, that an architect prepared plans for a building, retained the originals in his office, and had copies out with contractors; that several months later the owner told the architect that he did not intend to build, and that the architect then told the owner that he could have the plans at any time he wished to go ahead with the building, is *held* sufficient to sustain a finding of the jury that the plans had been tendered to the owner.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The complaint alleges, in effect, that June 21, 1900, the plaintiff, an architect, agreed with the defendant (1) to make, prepare, and furnish to and for defendant plans and specifications for the proposed construction of two flat buildings; (2) to superintend the construction of same; and (3) to superintend the removal and remodeling of two other dwelling houses belonging to the defendant, for all of which, and the labor and services in that behalf, defendant agreed to pay plaintiff $345.04; that the plaintiff performed all of the foregoing, except (2) the superintending of the construction of the two proposed flat buildings; that although plaintiff was always, and still is, ready and willing to do said work, and offered to perform, he was prevented by the defendant from performing said part of the contract; that the defendant on

October 30, 1900, paid $40 on said contract, and still owes the balance of the contract price, $305.04, for which sum judgment is demanded. The answer consists of several admissions, and the denial of the making of the contract alleged in the complaint, and alleges the making of a different contract. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $305.04.

From the judgment entered thereon for that amount, with costs, the defendant appeals.

In charging the jury, the court properly stated the claims of the respective parties as follows:

"The plaintiff claims that on or about June 21, 1900, he entered into a contract with the defendant wherein it was agreed that plaintiff should, as is alleged in the complaint, (1) prepare and furnish plans and specifications for the construction of two flat buildings for the defendant; (2) superintend the erection and construction of said flat buildings; (3) superintend the removal and remodeling of two so-called old houses of the defendant; and that for plaintiff's services, work, and labor in this behalf he claims that the defendant agreed to pay the plaintiff the sum of $345.04, or four per cent. of the estimated cost of all of such work just detailed. On the part of the defendant, it is insisted that there was a contract between the parties which covered an agreement in respect to the removal and remodeling of the two so-called old houses of the defendant, and that as compensation for these services, work, and labor, plaintiff was to receive the sum of $40, which work was performed and payment made, and that, as to the rest of the contract claimed by plaintiff to have been made, defendant insists that it was simply an offer, which was not to be accepted unless the estimates for the construction thereof did not exceed, substantially, the sum of $6,000."

The court thereupon instructed the jury, among other things, as follows:

"The burden of proof as to the issue in this case is upon the plaintiff; that is to say, the plaintiff must prove by a preponderance of the evidence that his contention is correct.

. . . If your minds, gentlemen, are satisfied by a preponderance of all the evidence in the case that the parties did contract, *as the plaintiff contends they did,* and as set forth by the court in its charge—that is to say, if the minds of the parties plaintiff and defendant met on the proposition contended for by the plaintiff—then your verdict should be for the plaintiff. But if, from a preponderance of all the evidence in the case, *your minds are not so satisfied or convinced,* then your verdict should be for the defendant. . . . If you believe from a preponderance of all the evidence in the case that the minds of the parties did not meet as to the new work—that is to say, as to the flat buildings—and that there was no agreement consummated as to the same, then your verdict should be for the defendant. . . . If you find that the plaintiff, *Graf,* was employed to make, prepare, and furnish to and for the defendant, *Laev,* plans and specifications for the proposed erection and construction of two certain flat houses or flat buildings, then, in order to entitle said plaintiff to recover any compensation therefor, he must show their delivery to the defendant, *Laev,* or a tender of them to the defendant, *Laev.* I further instruct you that the burden of proof is upon the plaintiff that the contract relating to the flat buildings was actually made, and that the minds of both parties actually met."

For the appellant there was a brief by *Roemer & Aarons,* and oral argument by *C. L. Aarons.*

For the respondent the cause was submitted on the brief of *Ernest A. Kehr.*

CASSODAY, C. J. 1. Error is assigned because the court refused to instruct the jury, in addition to the portion of the charge given in the foregoing statement, as follows:

"If you find that the defendant, *Laev,* required plans and specifications for certain buildings, to cost about the sum of $6,000, there can be no recovery by the plaintiff, *Graf,* unless the said buildings could have been erected for about the sum named."

The parties differed widely as to the terms of the contract. The instruction so requested is to the effect that, if the jury

should find the contract to be as claimed by the defendant, then the plaintiff could not recover. The instructions given and found in the statement of facts, in effect, covered all that was requested, and more, too. The jury were instructed to the effect that they could not find for the plaintiff unless they were satisfied by a preponderance of the evidence that the contract *was in all respects* as claimed by him; that, if they were not so satisfied or convinced, their verdict should be for the defendant; and that if they believed from a preponderance of the evidence that the minds of the parties did not meet as to the new work—as to the flat buildings—then they should find for the defendant. We must hold that there was no error in refusing such instruction.

2. Error is assigned because the court charged the jury as follows:

"If you find for the plaintiff—that is to say, if you find that the contract was entered into between the parties as contended for by the plaintiff—then you will take up the consideration of the damages recoverable in this action; and I instruct you, as a matter of law, that, if you find for the plaintiff, the damages recoverable by the plaintiff in this action are the sum of $305.04."

The amount so stated was the full amount of the contract price, as claimed by the plaintiff. True, the terms of the contract were in dispute, and accordingly the amount of the plaintiff's compensation was in dispute. But it will be observed that under the charge of the court, as given, the jury were precluded from finding any damages in favor of the plaintiff unless they first found that the contract between the parties was "as contended for by the plaintiff." The jury having found that the contract was as claimed by the plaintiff, the question presented is whether in assessing damages there should have been an abatement from the full contract price. There is no question but that the plaintiff performed most of the services under the contract, as he claimed it to be, and was ready at all times to perform the balance. Prior to the

time when the defendant refused to go on with the job, the plaintiff declined to do work for other parties for the reason that he expected to perform his contract with the defendant. As conceded by counsel for the defendant, the contract was for the personal services and skill of the plaintiff, as an architect, in planning and designing and superintending the work contracted for, and certifying to the sufficiency of the work of contractors, and the correctness of bills rendered. Such work could not be delegated to others. The plaintiff was undoubtedly entitled to recover the amount which he would have earned under such contract, less what he might in the meantime have earned elsewhere. *Winkler v. Racine W. & C. Co.* 99 Wis. 184, 188, 74 N. W. 793. In that case it was held that "in an action by an employee to recover damages for such wrongful discharge, the burden of proving in mitigation of damages that the plaintiff could have obtained employment elsewhere is upon the defendant." As there said by way of quotation from an earlier case:

"In the absence, therefore, of any evidence that the party might have obtained any other employment, the law can adopt no other rule of damages than the contract price, unless there is some legal presumption that such other employment might be obtained." *Danley v. Williams,* 16 Wis. 581, 586. See, also, *Hildebrand v. American F. A. Co.* 109 Wis. 171, 181, 85 N. W. 268.

In the case at bar the defendant failed to prove that the plaintiff might have obtained such employment elsewhere, or any fact in mitigation of the plaintiff's damages. The case is unlike *Nilson v. Morse,* 52 Wis. 241, 9 N. W. 1, and other cases cited by counsel, where the performance of the specific work contracted for could be delegated to others. We find no error in charging the jury on the measure of damages.

3. As indicated in the statement of facts, the court charged the jury that in order to entitle the plaintiff to recover any compensation for making, preparing, and furnishing the

plans and specifications, he must show their delivery or tender of them to the defendant. It is now claimed that the evidence is insufficient to support the verdict to the effect that such plans and specifications were so delivered or tendered. The plaintiff testified to the effect that, after the contract for removal and remodeling was completed, he had the originals in the office, and copies out with the contractors, and he believed the defendant also had a copy; that, when the defendant refused to go on with the flat buildings, the plaintiff had the plans and specifications of those buildings; that he had no reason to offer them to the defendant, and did not; that in the latter part of December, 1900, the defendant said he was not going ahead with those buildings; that, when he said that, the plaintiff told him he could have the plans and specifications any time that he wanted to go ahead; that he could have them "any time he wished to go ahead with those buildings—any time in the future." We are constrained to hold that the evidence was sufficient to sustain the finding of the jury to the effect that such plans and specifications were tendered to the defendant as stated in the charge of the court. *Wright v. Young,* 6 Wis. 127; *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

N. BOYINGTON COMPANY, Appellant, vs. SOUTHWICK and another, Respondents.

December 12, 1903—January 12, 1904.

Taxation: Assessment to wrong person: Variance in descriptions: Mistake in name of plat: Mortgage interest: Material and immaterial defects: Limitation of actions.

1. The failure of an assessor to assess real estate in the name of the true owner is *held* insufficient to render the assessment void, where the circumstances indicate that the assessor might readily have believed that the party assessed was the owner; that the tax was a proper one, and that the owner had knowledge of the assessment, levy, and delinquent sale.
2. A variance between the description of a city lot in the assessment roll and in the delinquent tax return consisted in the omission from the latter of the abbreviation "ft." after the figures indicating the dimensions of a portion of the lot excepted from the assessment. The unit of measurement when the lot was platted was feet, and the uncertainty could easily have been made certain by referring to the deed under which the owner claimed, or by inference from contemporaneous conditions, such as occupancy. *Held*, that the descriptions indicated the land with ordinary and reasonable certainty within the meaning of sec. 1047, Stats. 1898.
3. Describing land in the assessment roll as being in the "original plat" instead of S., E. & O.'s plat, as the fact was, is *held* not to have been such an error as would avoid the tax proceedings, where the evidence showed that such plat was the first plat of the city, and was commonly referred to as the original plat in conveyances and former assessments, and that such facts were known to the owner when the tax proceedings were had.
4. Where a conveyance of a portion of a city lot was in fact a mortgage, and contained a provision that the grantor should pay the taxes, a subsequent assessment of the entire lot to the grantor would not render the assessment void.
5. Failure to assess land in the name of the true owner; describing city lots in the assessment roll under the wrong plat name; and assessing an entire lot to one person where he only owned a portion of it, unless shown to have been immaterial by reason of other facts and circumstances, are defects which go to the validity of the assessment and affect the groundwork of the tax. The limitations of sec. 1210*h*, Stats. 1898, therefore apply.

6. An immaterial variation between the description of a tract in the assessment roll and the delinquent return is not a defect which goes to the validity of the assessment and affects the groundwork of the tax.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Prior to November 17, 1884, John A. Walker was the owner of the west half of lot 6, and all of lots 7, 8, and 9 of block 29 of Strong, Ellis & Others' addition to the city of Stevens Point. The title was thereafter transferred among members of the Walker family, who on April 23, 1894, conveyed to J. L. Prentice a part of this property described as follows:

"Commencing at Strongs avenue at the south line of lot 9, block 29, in Strong, Ellis & Others' addition to the city of Stevens Point, running thence east on the south line of lots 9, 8 and 7 in said block 29, 100 feet, thence north parallel with the east line of Strongs avenue 25 feet, thence west on a line parallel with said south line of said lots, 9, 8 and 7, 100 feet to Strongs avenue, thence south along Strongs avenue to place of beginning."

On August 1, 1894, a parcel of this property of like shape and size to the piece conveyed to J. L. Prentice, and lying immediately north of it, was conveyed to August Goerke. Goerke, as a part of the transaction, executed a land contract wherein he agreed, on payment of a loan made by him to the owners, to convey this parcel to V. P. Atwell. On September 1, 1894, Atwell took a conveyance to all of the lots above mentioned as having belonged to Walker, excepting the parcels conveyed to Prentice and Goerke. Atwell is an officer and stockholder of the plaintiff company, and at the time of the assessment and tax sale, hereafter mentioned, held title under these conveyances. On May 24, 1897, Atwell and wife conveyed the lots (excepting only the parcel conveyed to Prentice) to the *N. Boyington Company.* August 10, 1899, Goerke and wife conveyed their interest in this land

to the plaintiff company. The *N. Boyington Company* is a corporation formed shortly after the death of N. Boyington. Annis Boyington, the widow of N. Boyington, is president. Ella Boyington, a daughter of N. Boyington and sister of the wife of Atwell, is secretary, and V. P. Atwell has acted in the capacity of managing agent. The other stockholders of the corporation are heirs of N. Boyington.

In 1896 the assessor of the city of Stevens Point assessed to the *Boyington Company* property described as follows:

"The west half of lot No. 6, block No. 29, lot No. 7, except a piece 10 ft. x 25 ft. out of southwest corner, block No. 29, lot No. 8, except 25 feet off south end, block No. 29, lot No. 9, except 25 feet off of south end, block No. 29, in the original plat."

In 1897 the property was sold for the nonpayment of taxes. November 15, 1902, *F. A. Southwick,* by purchase and assignment, became the owner of the tax certificate, and on the same day served notice on the *N. Boyington Company* of his intention to make application for a tax deed thereon, describing the premises as follows:

"W. ½ of lot No. 6, block No. 29.

"Lot No. 7, except a piece 10x25 out of s. w. cor. block No. 29.

"Lot No. 8, except 25 feet off South end, block No. 29.

"Lot No. 9, except 25 feet off South end, block No. 29.

"Original Plat of City of Stevens Point."

In addition to the foregoing facts, it appears from the court's findings that the property was properly assessed, and returned delinquent to the county treasurer; the premises were thereafter sold at the delinquent tax sale of the county for the year 1897; V. P. Atwell held the title to the premises at the time of this assessment and tax sale, and had knowledge of the assessment and sale for delinquent taxes; and the owners had not paid the taxes and charges against the property covered by the certificate held and owned by respondent, *F. A. Southwick.*

The court awarded judgment in favor of defendants, setting a time within which the property might be redeemed, and declaring that, if any right of action ever existed, it had been extinguished by the statute.

For the appellant there was a brief by *Cate & Dahl* and *Lamoreux & Park,* and oral argument by *B. B. Park.*

For the respondents there was a brief by *McFarland, Hanna & Murat;* and oral argument by *C. B. McFarland.*

SIEBECKER, J. The questions involved in this case relate to the validity of the assessment upon the lots described in the complaint, and the regularity of the proceedings for the tax sale of 1897 upon the delinquent return for taxes for the previous year.

The validity of the assessment is attacked because the property was not assessed in the name of the owner. There is nothing to indicate that the assessor acted wrongfully or negligently in failing to assess the property to the true owner. At the time of the assessment the title to the property was in the name of V. P. Atwell. He was then managing agent of the *N. Boyington Company.* This company was composed of himself, his wife, her mother, and her two sisters, and carried on a real estate and lumber business in the city of Stevens Point. The facts and circumstances of the case indicate that the assessor might readily believe the *N. Boyington Company* to be the party against whom the lots were properly assessable. It is undisputed that the tax was a proper one, and it is shown that the true owner had knowledge of the assessment, levy, and delinquent sale. Under such circumstances, the error could not have misled him to his injury; nor could it have affected the interests of the *N. Boyington Company,* the subsequent purchaser. The error is therefore immaterial, and insufficient to render the assessment void.

It is urged that the variation in the descriptions of the premises intended to be covered by the assessment and the

delinquent tax return and sale are such as to render these proceedings fatally defective, and particularly that the descriptions of the exception from lot 7 are so imperfect that they fail to comply with the "ordinary and reasonable certainty" required by sec. 1047, Stats. 1898, which prescribes:

"In all assessment and tax rolls . . . any descriptions of land which shall indicate the land intended with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be deemed sufficient," etc.

The assessment roll describes the part excepted from lot 7 as "a piece 10 ft. by 25 ft. out of the southwest corner," and the delinquent return omits the abbreviation of "ft." after the figures "10" and "25." This irregularity, from its nature, shows a merely clerical omission, and reference to the assessment roll would disclose the unit of measurement. Feet was the unit of measurement as to the width and depth of the lots when platted, and this fact would also indicate that the excepted parcel was measured in feet. The uncertainty as to the parcel excepted could easily be made certain by reference to the Prentice deed, or by inference from contemporaneous conditions, such as the occupancy by Prentice of a particular piece answering the description. In the light of the facts and circumstances of the case, we must hold these descriptions to indicate the land with ordinary and reasonable certainty. *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Cate v. Werder,* 114 Wis. 122, 89 N. W. 822; *Meade v. Gilfoyle,* 64 Wis. 18, 24 N. W. 413.

It is urged the court erred in its finding that the Strong, Ellis & Others' plat, recorded June 20, 1852, was the original plat of the lands in the city of Stevens Point. The evidence is abundant to show that this plat is commonly referred to as the original plat, and that it has been so treated in conveyances and in former assessments. These facts were known to Mr. Atwell at the time of these proceedings. The evidence

fully sustains the court's findings upon this issue, and no error is shown which makes the tax proceedings void upon this ground.

The contention that the assessment is void because the property assessed included premises which had been conveyed to Goerke is without merit, for it was clearly shown that this conveyance amounted to a mortgage to secure a loan made by Goerke to the owners. This conveyance contained a provision that the owners were to pay the taxes.

With the exception of the variation of descriptions between the assessment roll and the delinquent return of the parcel excepted from lot 7, and which, as above stated, is an immaterial variation, the defects and errors upon which relief is sought in this action are such as go to the validity of the assessment, and affect the groundwork of the tax; and the limitations of sec. 1210*h*, Stats. 1898, therefore apply to this cause of action.

In view of the circumstances of the case, and the application of the statute above mentioned, we think the action of the circuit court should be sustained.

By the Court.—Judgment affirmed.

W. G. TAYLOR COMPANY, Respondent, vs. BANNERMAN and others, Appellants.

December 12, 1903—January 12, 1904.

Contracts: Mutuality: Exclusive agency: Breach: Damages.

1. A contract between principal and agent, signed by both parties, by which one party, the owners of a stone quarry, appointed the other as their exclusive agent for Illinois and Wisconsin for the sale of certain described stone at prices fixed therein, and agreed to quote no prices to others without the agent's consent, is not void for want of mutuality, but at least re-

quires the agent to act in good faith and use due diligence in bringing the principal's stone to the notice of possible purchasers for the purpose of sale to them.

2. In an action by the agent to recover damages for breach of such a contract, it appeared that the principal sold stone to others at the contract price, and that the agent offered to sell the same stone to the same parties at the same price. *Held*, that the agent was not damaged by the sale.

3. By a written agreement the agent in such a case consented to the sale of a certain quantity of stone to a third party at a fixed price "in consideration of certain conditions," and it was shown by other evidence that the consent was granted upon the understanding that the purchaser had worked up certain private jobs of paving, as distinguished from ordinary city contracts, and had an unexpired contract with the principal for stone. *Held*, that the permitted sales were limited to such purposes only, and that the agent was entitled to damages for all sales made by the principal to such purchaser which were used for purposes outside of such understanding.

4. After having filled part of an order made by an agent under a contract with a third person, the principal refused to supply any more stone on the ground that the agent had failed to pay him $600 due for stone already shipped. At that time the agent had a well founded claim against the principal for damages for breach of the contract amounting to more than the sum due. The agent was unable to obtain the stone elsewhere, and the purchaser thereupon cancelled the contract. *Held*, that the principal was liable to the agent for the profits lost by reason of the failure to supply the stone.

5. Where a principal contracts with an agent to sell to or through the agent the entire output of a stone quarry, and the principal sells the entire output to a third party, and the agent has also taken orders sufficient to absorb it all, the agent cannot recover the difference between the contract and market price upon that sold by the principal, and, in addition, recover the difference between the contract and sale price on that for which the agent had taken orders.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Modified and affirmed.*

Action to recover damages for breaches of contract. The plaintiff was a corporation engaged at Milwaukee in the business of contracting for the sale of stone. Defendants were

partners owning a granite quarry of limited capacity at Berlin, in this state. During the year 1898 plaintiff had been selling agent for all the product of the defendants' quarry upon an agreed commission. After some negotiation, indicating a desire to change that relation so that the plaintiff should secure a fixed price to defendants and receive any obtainable price above that as its compensation, a written contract was made on February 1, 1899, in the following words:

"We hereby appoint the *W. G. Taylor Co.*, of Milwaukee, our agents for Wisconsin and Illinois, and agree to sell them the following described stone, f. o. b. cars Berlin, Wis., as follows: [List of kinds and prices.] It is further agreed that the *W. G. Taylor Co.* are our exclusive agents for Wisconsin and Illinois, and we will quote no prices to others without their consent. This agreement is understood to be in force for the full term of one year from February 1st, 1899. [Signed by both parties.]."

The words "make no prices" were shown to have the additional significance in the trade of "make no sales." It was claimed, and the court found, that defendants committed numerous breaches of the contract, whereby plaintiff was deprived of profits aggregating $3,954.45, which sum was allowed it as damages. An undisputed balance of $643.25 due from plaintiff was allowed on defendants' counterclaim, and for the balance, $3,311.20, together with interest from the date of the commencement of the action, judgment was rendered in favor of plaintiff, from which the defendants appeal.

For the appellants there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.* They contended, *inter alia,* that the agreement relied upon by plaintiff is void for want of mutuality. *Hoffman v. Maffioli,* 104 Wis. 630; *Teipel v. Meyer,* 106 Wis. 41; *Dodge v. Hopkins,* 14 Wis. 630, 636; *Atlee v. Bartholomew,* 69 Wis. 43; *American C. O. Co. v. Kirk,* 68 Fed. 791; *Davie v. Lumbermen's M. Co.* 93 Mich. 491; *Bailey v. Austrian,* 19 Minn. 535; 1 Parsons, Contracts, 499, note Z; *Rafolovitz v. Am. T. Co.* 73

Hun, 87, 25 N. Y. Supp. 1036; *Campbell v. Lambert,* 51 Am. Rep. 1.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

DODGE, J. Appellants' first position is that the entire contract of February 1, 1899, was void for want of mutuality, for that the plaintiff did not thereby bind itself to purchase any stone or do any other thing. This position we deem untenable. The signature of plaintiff's name to that paper was obviously for the purpose of acceptance. The presumption is that such signing was done for some purpose, and no other is apparent. If an acceptance, it bound the plaintiff to perform any acts on its part necessarily implied either from those things which defendants were bound to do or from the situation created by the contract. *Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513, 55 N. W. 854; *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 555, 93 N. W. 459. Plaintiff therefore bound itself to be defendants' exclusive agent within the territory named, which, by the way, included the entire territory in which defendants' product could be advantageously sold, and to perform the duties resulting from such agency. Exactly what those duties were we need not attempt to catalogue. They at least included good faith and due diligence in bringing defendants' stones to the notice of possible consumers for purpose of sale to them. Such duties are shown to have been performed to the extent of the expenditure of much time and considerable money. Hence there was an obligation assumed by plaintiff sufficient to give mutuality to the agreement that it should be exclusive agent, and that defendants should neither quote prices nor make sales of its stone to others. *Mueller v. Bethesda M. S. Co.* 88 Mich. 390, 50 N. W. 319; *Russell v. Horn, B. & F. Mfg. Co.* 41 Neb.

567, 59 N. W. 901. We need not at this stage of the discussion decide whether the surrounding circumstances were such as to warrant a conclusion that plaintiff should take or defendants should supply stone to any ascertainable amount—whether all the product of the quarry or all that plaintiff by due diligence might be able to sell. The breaches of this contract necessary to be considered consist in sales of stone by defendants to others than plaintiff. We proceed to consider them.

1. Defendants sold to the Chicago, Milwaukee & St. Paul Railway 2,200 square yards of paving stone, which plaintiff had offered to sell and would otherwise have sold at a profit above the contract price of $88. Such facts are undisputed, the only excuse offered being the asserted consent by plaintiff. That is negatived by a finding for which we find sufficient supporting evidence. We see no escape from the conclusion reached by the trial court that defendants are liable for that sum. The sale by them was in breach of their express agreement, and the damage to the plaintiff was the direct and natural result.

2. A similar sale of 1,050 square yards was made to the same party, for which the trial court awarded damages in the sum of $52.20. We agree with the finding that such breach was committed, but plaintiff's secretary testifies that he offered to make the same sale at $1.11 per square yard, and would have made it if defendants had not. That price is the same as the contract required plaintiff to pay; hence obviously there could have been no damage to it from failure to make the sale. This item cannot be allowed.

3. Defendants sold a small quantity of stone to one Kelly, which otherwise plaintiff could have sold at an established market price so as to yield it a profit of $143.34. We discover no evidence to warrant disturbance of the trial court's findings to the foregoing effect. The conclusion of defendants' liability for the gains so prevented is obviously correct.

4. Another item of damage allowed plaintiff was $2,407.81 for profits it would have made on approximately 7,500 square yards of stone, that amount having been sold direct by defendants to Gaffney & Long or the Gaffney & Long Construction Company in Chicago, between May 13 and December 31, 1899. The fact of the sales was undisputed, and the margin of profit which plaintiff would have made as found by the trial court was sustained by the evidence. The defense was a written consent given by plaintiff on February 8, 1899, in following words:

"February 8, 1899.

"*Wm. Bannerman, Esq.,*
"*Supt. of Berlin Quarry Co.,*
"*Berlin, Wis.*

"In consideration of certain conditions, we hereby agree to allow the Berlin Granite Co. the privilege of selling to Messrs. Gaffney & Long, contractors, of Chicago, Ill., four thousand (4,000) yards of smooth blocks, six inches deep, and between (3,000) and (4,000) three and four thousand yards of common blocks, this on old deals pending. But the price to Gaffney & Long shall not be less than $1.90 per yd. f. o. b. Chicago for 6-inch smooth, and $1.12½ f. o. b. cars Berlin, Wis., for the common block.

"W. G. TAYLOR CO.
"L. H. TAYLOR, Secy."

It was in proof that this consent was granted upon the understanding and representation that Gaffney & Long had worked up certain prospective private jobs of paving, as distinguished from the ordinary contracts let by the city on open competition, and that they held an unexpired contract with defendants for stone. The court below held that the evidence of the circumstances and purpose of this contract required a construction limiting the permitted sales to meet such purposes. We feel constrained to concur with this view. Hence such sales as were outside of this consent so construed were as much in breach of plaintiff's contract as any of those already considered. When, however, we come to examine the

evidence, we find none at all to show that any of the stone sold to Gaffney & Long, either under that name or under the name of Gaffney & Long Construction Company, in which they continued business, were shipped or used for other than such private jobs, except as to that used under publicly let contracts for paving Desplaines street from Madison street to Van Buren street, and for Twelfth street from Canal street to Halsted street. All the rest may have been for the very purpose covered by plaintiff's consent, and it is undisputed that defendants sold it in good faith believing that to be the case. We cannot escape the conclusion that plaintiff has failed to prove any breach of the contract in this connection except to the extent of the stone for the two public contracts above mentioned, upon which the profits at the rates adopted by the court would have aggregated only $1,749.99. As a result, we must hold that $657.82 of this item was erroneous.

5. Another element of damage rests upon failure to perform a distinct contract by defendants to sell 15,000 square yards of paving stone to plaintiff to fill a contract for the same amount which it had made to sell and deliver to the Milwaukee Electric Railway & Light Company. Plaintiff having communicated such contract to defendants in April, 1899, and ordered the stone to fill it, they accepted the order, and shipped from time to time about half the quantity. In January, 1900, they refused to ship more, on the ground that plaintiff had failed to pay some $600 then due for stone previously shipped. They thereupon informed the street railway company that they would not deliver any more on plaintiff's contract, but, if that contract were canceled, would themselves deal directly with the street railway company and supply what it needed. Plaintiff was unable to obtain stone elsewhere to deliver upon its contract, and the street railway company therefore canceled it, so that plaintiff lost the profits it would have made on the remainder of the 15,000 square yards. Plaintiff's reason for not paying the $600 for stone

shipped was its claim that defendants were indebted to it in a still larger amount upon an accounting of profits upon their sales in breach of their contract, which claim it now appears was well founded. The findings of the trial court to substantially the foregoing effect are not antagonized to any clear preponderance of evidence, although there is much dispute as to some of them. The conclusion of liability for the profits lost, namely, the difference between defendants' price to plaintiff plus expenses of delivery and the selling price to the street railway company, is, of course, irresistible.

6. The next item of damage allowed is $684, the profits plaintiff would have made on 1,800 square yards of stone which it had opportunity to sell to one Kelley, but was unable to because defendants rejected its order therefor, made October 26th, for delivery November 15th. In order to sustain this item of damage the court must have held that the contract not only forbade defendants from selling stone to others, but also required them to sell to plaintiff all that it should order for actual sales made by it, at least up to the output of defendants' quarry; otherwise there was no breach in refusing to accept this order. We shall not deem it necessary to resolve this somewhat doubtful question. Conceding, *arguendo*, such construction, it is entirely obvious that the defendants did not agree to sell plaintiff anything except the output of their quarry as ordinarily operated with reasonable diligence. The latter could therefore suffer no more loss than the profits to result from a resale by it of all that stone. If defendants had sold it all to some one else, and plaintiff had also taken orders sufficient to absorb it all, it could not recover difference between contract and market price upon that sold by defendants, and in addition recover difference between contract price and sale price on that for which the plaintiff had taken orders. That would obviously be duplication of the damages actually suffered. Now, while the trial court has found that defendants could have produced

the stone to fill this order for Kelley after October 26th, and while that finding is perhaps supported by some evidence, it is perfectly clear that they could not have produced stone to fill that order, and also those accepted by themselves, on which they have already been charged with damages. The late deliveries to the Gaffney & Long Construction Company, and the required deliveries to the street railway company which they did not make, but on which they have been charged for loss of profits, would by the clearest evidence have more than exhausted all they could produce within the contract term. The order taken from Kelley only serves to prove that plaintiff could have sold so much of the stone that defendants disposed of elsewhere. When, however, it receives the profits it could have made on that stone, it is fully compensated. We hold, therefore, that this item of damage was not recoverable in addition to the other allowances.

The result of the foregoing is that the trial court erroneously allowed $1,394.32 of damages, which, with interest from commencement of suit, July 7, 1900, to date of findings, January 10, 1903, has entered into the judgment, which therefore is improperly swollen to the extent of $1,597.39.

By the Court.—The judgment is modified by reducing the damages therein awarded to $2,210.49, and the total to $2,487.14, and as so modified is affirmed; appellants to recover costs in this court.

KENNEDY, Respondent, vs. PLANK and another, Appellants.

December 12, 1903—January 12, 1904.

Appeal and error: Bill of exceptions: Mistake in selling drugs: Damages: Evidence: New trial: Newly discovered evidence.

1. An objection that a verdict is perverse and contrary to the evidence cannot be considered in the absence of a certificate that the bill of exceptions contains all the evidence material to the case.

2. In an action to recover for injury to plaintiff's horses claimed to have been caused by feeding them copperas, sold and delivered to him by defendants by mistake for Glauber's salt, there was evidence that the horses were in good condition up to the time they were fed the copperas; that all of the horses to which the copperas was fed manifested the same systemic derangement within a week or ten days after they were fed it; that a *post mortem* examination of those that died showed conditions such as copperas poisoning produces in horses, and that no other cause was shown to which such conditions were attributable. *Held*, sufficient to show that copperas fed to horses in such quantities as plaintiff gave was injurious to health.
3. Orders refusing a new trial in jury cases cannot be reversed on appeal upon the ground that the verdict is contrary to the weight of the evidence, unless it clearly appears that there is no credible evidence to support the verdict.
4. Evidence that plaintiff procured copperas for a neighbor under the same circumstances as he procured it for himself; that such neighbor fed it to his horses; that his horses manifested the same symptoms as those of plaintiff's within the same time, and that a *post mortem* examination disclosed physical conditions similar to those found in plaintiff's horses and indicated the cause of death and ailment of the animal, is *held* to have been admissible as tending to corroborate that the sickness of plaintiff's horses was the result of defendants' negligence.
5. In such case, refusal to grant a new trial on the ground of newly discovered evidence, based upon affidavits tending to show that after the death of plaintiff's horses he and the veterinary surgeon who treated them made statements as to the cause of their death at variance with their testimony on the trial, is *held* not to have been erroneous.

APPEAL from a judgment and order of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Defendants conducted a general store, including a drug department, in the village of Hancock. Plaintiff is a farmer residing near by. He alleges that on May 22, 1899, while at the store, he called for two packages of Glauber's salt, of four pounds each, and that defendants, through one of their clerks, sold and put up for him two packages of copperas instead of the Glauber's salt; that he caused the copperas to be

administered to his horses by his hired man in the belief that it was Glauber's salt; that in consequence thereof the horses were made ill, required medical attendance, and were rendered unfit for farm uses, and therefore he was subjected to the expense of hiring horses to do his work. One of the horses died in the month of August, 1899. It appears that plaintiff obtained the two packages, one for himself, and one for his neighbor, a Mr. Tibbitts; and there is evidence tending to show that one of Mr. Tibbitts's horses became sick and showed symptoms of a like nature about the same length of time after having been fed the copperas as plaintiff's horses. Defendants deny the negligence charged, and claim that Glauber's salt was delivered as requested by plaintiff, but that he, through his negligence, exchanged it for two packages of copperas which were on the counter of defendants' store at the time of the transaction.

The evidence included in the bill of exceptions is in sharp conflict upon the material questions litigated upon the trial. Under proper instruction, the court submitted all the issues, and the jury found in plaintiff's favor in the sum of $357.16. Judgment for this amount was awarded plaintiff, and from that judgment this appeal is taken. Defendants also appeal from an order denying their motion for a new trial.

For the appellants there was a brief by *McFarland, Hanna & Murat* and *Corrigan & Johnson,* and oral argument by *C. B. McFarland* and *W. D. Corrigan.*

D. D. Conway, for respondent.

SIEBECKER, J. Respondent recovered damages upon the verdict of the jury. He alleged the injuries resulted from appellants' negligence in delivering copperas to him instead of Glauber's salt, as he requested, for use as a medicine for his horses. Appellants attack the judgment upon the ground that the verdict is perverse and contrary to the evidence. An examination of the record discloses that it is not certified that

the bill of exceptions contains all the evidence material to the issues in the case. Upon this state of the record, this court cannot review this assignment of error. *Lain v. Shepardson,* 23 Wis. 224; *Conatty v. Milwaukee E. R. & L. Co.* 100 Wis. 467, 76 N. W. 482.

It is, however, apparent from an inspection of the evidence before us that the jury were warranted in finding as they did. The main questions submitted to the jury were: (1) Did appellants, at the time alleged, sell and deliver copperas to respondent in place of Glauber's salt? and (2) Did respondent's horses become sick as a result of feeding them the material procured from appellants?

Respondent asserts and appellants deny that respondent received copperas when he called for Glauber's salt. The evidence submitted by the parties upon this question was in conflict, and the court submitted the issue to the jury upon a general verdict. The proof tending to support the position of either party was of such nature and weight as to require the trial court to submit it to a jury for determination.

It is, however, urged that there is no evidence tending to show that copperas fed to horses in such quantities as respondent fed it would be injurious to their health. We find no foundation for this contention in the evidence. There is considerable evidence tending to show that the horses were in a good state of health up to the time they were fed the copperas; that they manifested the same symptoms of weakness, debility, and a systemic derangement within a week or ten days after they were fed it, and their symptoms showed they were affected from a like cause. No other cause was shown to which this condition was attributable, and the *post mortem* examination of respondent's, as well as Mr. Tibbitts's horses, sustained the claim that the conditions were such as copperas poisoning produces in horses.

In the light of this evidence, the issue was properly submitted to the jury, though there was strong and persuasive

evidence in conflict with the proof sustaining the verdict. This court cannot reverse orders refusing a new trial in jury cases upon the ground that the verdict is contrary to the weight of the evidence unless it clearly appears that there is no credible evidence supporting the verdict approved by the court. *Jones v. Evans,* 28 Wis. 168; *Ray v. Northrup,* 55 Wis. 396, 13 N. W. 239; *Smith v. Lander,* 48 Wis. 587, 4 N. W. 767; *Becker v. Holm,* 89 Wis. 86, 61 N. W. 307.

It is argued that the court erred in receiving the testimony of the veterinarian, F. S. Lawrence, and of Mr. Tibbitts, relating to the sickness and *post mortem* examination of Tibbitts's horse. The testimony hardly admits of dispute that the horse was fed copperas, procured from appellants by respondent at the time he purchased for himself; that it was fed to the horse by Mr. Tibbitts; that it became sick, manifesting symptoms like those of respondent's horses, within the same period of time; and that upon a *post mortem* examination the veterinarian observed physical conditions corresponding significantly to the conditions observed in the horses of respondent, and indicating the cause of ailment and death of the animal. This evidence had a direct bearing upon the inquiry as to what effect copperas has upon horses when fed in the quantities shown in this case, and tended to corroborate respondent's claim that the sickness of his horses was the result of appellants' negligence. The testimony was properly admitted.

We are now to determine the question presented upon the appeal from the order overruling appellants' motion for a new trial, and to vacate the judgment upon the ground of newly discovered evidence. The issues litigated have been sufficiently stated. The affidavits upon which the motion is based show that the alleged newly discovered evidence consists of statements and admissions of respondent, made during the fall of 1899, to the effect that his horses were poisoned by sal soda obtained from appellants in place of Glauber's

salt, and that he did not know the cause of his horses' sickness and death. True, the evidence does not agree in some respects with respondent's statements upon the trial as to his knowledge of what he secured from appellants in place of the Glauber's salt. It appeared he had no positive knowledge that he procured copperas until he learned it through Prof. Daniels, but he always spoke of the poison as having been sold him by appellants in place of Glauber's salt. This rendered the alleged newly discovered evidence of little weight in the determination of the issuable facts. These admissions that he did not understand the cause of the sickness is in its nature weak and unsatisfactory, in view of the positive statements made at about the same time that the horses were sick from what appellants had given him in place of the Glauber's salt. The evidence that Dr. Lawrence made statements on this subject to various persons before the trial which was in conflict with his testimony is of the same nature, and can add but little, if any, weight to sustain the motion. We are of opinion the trial court was fully warranted in holding that, if this evidence were produced and submitted to a jury with the other evidence, it ought not to, nor would it probably, lead to a verdict different from the one rendered. *Goldsworthy v. Linden,* 75 Wis. 25, 43 N. W. 656; *Ryan v. Rockford Ins. Co.* 85 Wis. 573, 55 N. W. 1025; *Grace v. McArthur,* 76 Wis. 641, 45 N. W. 518.

We must hold that the action of the trial court in awarding judgment and denying the motion for a new trial is sustained by the record.

By the Court.—The judgment and the order of the circuit court are affirmed.

THE STATE EX REL. HUNT, Appellant, vs. STAFFORD, Respondent.

December 12, 1903—January 12, 1904.

Elections: Caucuses: Nomination by mass convention: Repeal of statute by implication: Constitutional law: Right of elector to have ballot counted.

1. Ch. 341, Laws of 1899, entitled "*An act relating to caucuses* and amending" secs. 11*a*–11*i*, Stats. 1898, provided that "caucuses and meetings of political parties held for the purpose of nomnating candidates or choosing delegates to assemble in convention to nominate any person for any general public office, to be voted for at any general . . . election . . . and all meetings for nominating candidates or choosing delegates to conventions to nominate candidates to be voted for at such elections, *commonly called caucuses*, unless held under the provisions of this act, are hereby declared to be *unlawful*, and no political party shall have its political ticket *placed upon the official ballot or canvassed* at such election, unless the nomination of its candidates are made in accordance with the provisions of this act;" and repealed secs. 11*a*–11*i* and *all acts and parts of acts in conflict with its provisions*. The first general law regulating caucuses and political meetings, was ch. 312, Laws of 1897, and with some modifications its provisions were incorporated into the revision of 1898 as secs. 11*a*–11*i*, of ch. 5, Stats. 1898, and the title of the chapter was changed from "Of Electors and General Elections" to "Of Caucuses, Electors, and General Elections." Sec. 30, Stats. 1898, provides that "candidates to be voted for" at general elections "may be nominated . . . by a convention or primary meeting, held for the purpose, consisting of an organized assemblage of electors." Sec. 31, Stats. 1898, provides for certifying the result of "nominations made by a convention;" sec. 40 prescribes the form of official ballots; and sec. 41 provides for the preparation of the official ballots and the voting and counting of the same, but neither of said sections is referred to in ch. 341, Laws of 1899, and all of them were in existence prior to the adoption of ch. 312, Laws of 1897. The day after ch. 341 was approved two other acts were also approved, the first (ch. 349) relating to official ballots and amending six sections of the Statutes of 1898, other than secs. 30, 31 and 41; and the second (ch. 351) amending sec. 30 by changing the percentage of voters necessary to entitle a political party to a place on the official ballot,

leaving the section otherwise unchanged. Ch. 457, Laws of 1901, also amended secs. 36–38, 40, Stats. 1898, as amended by ch. 349, Laws of 1899, relating to the form of the official ballot. *Held*, that nominations by mass conventions, provided for by sec. 30, Stats. 1898, were not abolished by the general repealing clause contained in ch. 341, Laws of 1899, and that a person so nominated, whose name appeared upon the official ballots and who received a majority of all the votes cast for the office for which he was a candidate, was duly elected and entitled to hold the office.

[2. Whether ch. 341, Laws of 1899, is constitutional, not determined.]

[3. MARSHAL, J., is of the opinion that the provision of sec. 30, Stats. 1898, authorizing nominations by mass conventions has been repealed by ch. 341, Laws of 1899, but that the constitutional right of an elector to participate with effect in elections, so far as having his choice of candidates regarded, is so far removed from legislative interference that he cannot rightfully be required, by any legislative act, to use a particular form in a particular way for indicating his choice, and thereafter have that choice disregarded because of its being in favor of one whose name was not rightfully on the ballot form placed, by public agencies, in his hands as correct.]

APPEAL from a judgment of the circuit court for Adams county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action of *quo warranto* brought to determine the right to the office of sheriff of Adams county, under ch. 149, Stats. 1898, commenced January 7, 1903. The cause, being at issue, was tried by the court, and at the close of the trial the court found as matters of fact, in effect:

(1) That July 10, 1902, the relator was and since has been a resident, citizen, freeholder, qualified elector, and a republican in the county, eligible to hold the office of sheriff therein; (2) that on the day named the relator was nominated for sheriff by the republican convention of that county, duly called and composed of delegates duly chosen by caucuses duly called and held for the several towns in the county, to be voted for at the general election in November, 1902; (3) that there are seventeen towns in Adams county, but no city or village nor any daily newspaper; (4) that no

democratic caucuses were called or held in the county for 1902, for the nomination of delegates to sit in a democratic convention to nominate candidates for county offices to be voted for at the general November election for 1902, and never at any time within the ten years last past had any democratic caucuses been called or held in that county; (5) that pursuant to notice duly published in a weekly newspaper, the democratic party of the county, on August 30, 1902, called a mass convention of that party for the nomination of candidates for the several county offices for the county, including member of assembly, to be voted for at the general November election for 1902; that such convention was called and notice given by the duly authorized democratic county committee; that at the time and place mentioned in such notice, and pursuant thereto, lawful democratic voters from seven of said towns, in pursuance of such notice, assembled in convention, and the same was duly organized, with a chairman and secretary and tellers and other officers, and by ballot nominated a candidate for each of the several county offices, including member of assembly, appointed a committee to represent the party in the county, and exercised the powers and performed the duties of a convention composed of delegates chosen at caucuses; that the defendant was unanimously nominated by such mass convention for the office of sheriff; that such convention was composed of twenty-eight democrats from the seven towns represented, and one not located in any particular town; (6) that at the close of such convention a certificate in writing, duly signed, executed and verified by the presiding officer and secretary thereof, as required by sec. 31, Stats. 1898, and other provisions of law, was duly made and filed with the county clerk October 14, 1902; (7) that the republican county convention duly caused to be made and filed its certificate of nominations for county officers with the county clerk in the form and manner and time required by law; (8) that neither the prohibition party nor

any other party, except the republican party, called or held any caucuses in the county for 1902 for the election of delegates to a county convention for the nomination of candidates for the several county offices to be voted for at the general election in 1902; that the prohibition party therein did, pursuant to notice, nominate a full ticket for county officers, including member of assembly, to be voted for at that election, and filed its certificate of nominations as required by law; (9) that pursuant to such three certificates the county clerk caused to be made and published, as required by law, a notice of election and information to voters, having thereon for sheriff in the proper columns the names of the relator and the defendant and the prohibition candidate, together with a full list in the proper columns of all candidates of the three parties for county offices, including member of assembly; (10) that at the time and in the manner and form required by law the county clerk duly prepared the official ballot for the general November, 1902, election, having thereon in due form and in the proper columns the names of the candidates of the several parties so certified to him, including the several candidates for sheriff, and duly caused to be printed and distributed the sample ballots provided by law, and caused to be printed and furnished for use at said election said official ballots at the time and in the manner and form required by law; that in said notice of election and information to voters, sample ballots, and upon all of said official ballots for the office of sheriff, in the democratic column, was the name of the defendant, in the republican column the name of the relator, and in the prohibition column the name of its candidate; (11) that the relator and the public generally read such notices and knew all the facts stated for some two months prior to the election in November, 1902, and took part in the campaign, without making any claim that the nomination of the democratic or the prohibition party was irregular or unlawful, and took no action or proceeding in court or other-

wise, and made no protest to the county clerk or otherwise against placing the defendant's name in the democratic column upon the official ballot, nor against placing the name of the prohibition candidate thereon; (12) that at said election the relator received 717 votes for the office of sheriff, and the defendant received 835 votes for that office, and the prohibition candidate received thirty-one votes for that office—that is to say, the defendant had a majority of eighty-seven votes and a plurality of 118 votes; "that of said 835 votes so received (by defendant) for said office of sheriff less than 717 votes and less than a plurality was by writing in on the ticket by the voter the name of said" defendant; (13) that after such election, and at the time and in the manner required by law, such votes for sheriff were duly counted and canvassed as required by law without any protest from the relator or any one, and a certificate of election in due form as required by law was duly issued to the defendant for the office of sheriff, and he duly took the oath of office and gave the requisite bond and qualified as such sheriff, as required by law, and entered upon the discharge of his duties as such sheriff, and has since continued to do so; (15) that the votes cast for sheriff for the three candidates named were only thirty-nine less than all the votes cast for the four several candidates for governor at that election; (14) and only 368 less than the whole number of votes cast in that county for president in 1900; (16) that for many years the democratic vote in that county had been very small, as indicated, not being more than about one-fifth of the voters; (17) that the democratic mass convention so held was pursuant to the advice of the republican and democratic state central committees, to the effect that the right to hold such mass conventions had not been taken away by ch. 341, Laws of 1899; (19 and 20) that the defendant was and is a resident, citizen, freeholder, and voter in the county and was and is qualified to hold the office of sheriff, and that he was so nominated

without fraud and in the belief that the same was legal and according to law; (21) that the secretary of the democratic convention of August 30, 1902, mentioned, was the then county clerk of the county.

And as conclusions of law, the court found, in effect, that the 835 votes cast for the defendant for the office of sheriff were legally and lawfully cast, and legally and lawfully canvassed and counted for him for that office; that the defendant was lawfully chosen at the November election of 1902 for the office of sheriff for that county for the term beginning the first Monday of January, 1903, by plurality vote of 118; that the defendant was and is the duly elected, qualified, and acting sheriff of the county, and is duly authorized to perform the duties and enjoy the privileges of said office for the regular term beginning the first Monday in January, 1903; that the defendant is not guilty of usurping or intruding into or unlawfully holding or exercising said office of sheriff, and is entitled to judgment dismissing said complaint upon the merits and for his costs of this action—and ordered judgment accordingly.

From the judgment so entered upon such findings, the relator appeals.

For the appellant there was a brief by *Lamoreux & Park* and *William Sweet,* attorneys, and *Allan T. Pray,* of counsel, and oral argument by *Mr. B. B. Park* and *Mr. Sweet.* They contended, *inter alia,* that ch. 341, Laws of 1899, is constitutional. 2 Brice, Am. Com. 47; *In re Duffy,* 4 Brewster, 531; *State ex rel. Doerflinger v. Hilmantel,* 21 Wis. 566; 10 Am. & Eng. Ency. of Law (2d ed.) 576, 586, 587; Cooley, Const. Lim. (3d ed.) *602; *State ex rel. Runge v. Anderson,* 100 Wis. 523; 32 Am. Law Reg. (N. S.) 104; *Todd v. Election Com'rs,* 104 Mich. 474, 480, 64 N. W. 496; *Ransom v. Black,* 54 N. J. Law, 446–451; *Talcott v. Philbrick,* 59 Conn. 472, 20 Atl. 436, 439; *People ex rel. Feeny v. Board of Canvassers,* 156 N. Y. 47–49; *People ex rel. Wells*

v. Common Council, 46 N. Y. Supp. 701; *Leonard v. Comm. ex rel. Att'y Gen.* 112 Pa. St. 607, 622; *State ex rel. Att'y Gen. v. Dillon,* 32 Fla. 545; *Sanner v. Patton,* 155 Ill. 553, 562; *Bowers v. Smith,* 111 Mo. 45, 33 Am. St. Rep. 491; *De Walt v. Bartley,* 146 Pa. St. 529, 28 Am. St. Rep. 814; *State ex rel. Plimmer v. Poston,* 58 Ohio St. 620; *Common Council of Detroit v. Rush,* 82 Mich. 532–537, 46 N. W. 951; *State ex rel. Cothren v. Lean,* 9 Wis. 279; *State ex rel. Wood v. Baker,* 38 Wis. 71; *Dells v. Kennedy,* 49 Wis. 555; *State ex rel. Schuetz v. Luy,* 103 Wis. 524; *State ex rel. Blodgett v. Eagan,* 115 Wis. 417. Ch. 341, Laws of 1899 is mandatory. 10 Am. & Eng. Ency. of Law (2d ed.) 722; *State ex rel. Brooks v. Fransham,* 19 Mont. 273, 290; *Jones v. State ex rel. Wilson,* 153 Ind. 440, 55 N. E. 229, 233; *Hornung v. Board of Canvassers,* 119 Mich. 51, 77 N. W. 446; *Stackpole v. Hallahan,* 16 Mont. 40, 40 Pac. 80; *Schuler v. Hogan,* 168 Ill. 369, 48 N. E. 195; *Blackmer v. Hildreth,* 181 Mass. 29, 63 N. E. 14; *In re Madden,* 148 N. Y. 136, 42 N. E. 534; *People ex rel. Hirsch v. Wood,* 148 N. Y. 142, 42 N. E. 536; *Mauston v. McIntosh,* 58 Minn. 525, 60 N. W. 672; *Weddel v. Durbin,* 26 Wis. 390; *Halstead v. Rader,* 27 W. Va. 808; *State ex rel. Doerflinger v. Hilmantel,* 21 Wis. 566; *People ex rel. Nichols v. Board of Canvassers,* 129 N. Y. 395; *West v. Ross,* 53 Mo. 350; McCrary, Elections, §§ 700, 723 and 724; *German Am. Bank v. Devlin,* 96 Wis. 155, 157.

For the respondent there was a brief by *Goggins & Brazeau* and *Corrigan & Johnson,* and oral argument by *B. R. Goggins* and *W. D. Corrigan.* They contended, *inter alia,* that that part of sec. 1, ch. 341, Laws of 1899, material to the case, has no application to nominations made at a county convention held for the purpose of nominating candidates for county office. *State ex rel. Brooks v. Fransham,* 19 Mont. 273, 290; *Hankey v. Bowman,* 82 Minn. 328, 84 N. W. 1002, 1004; *State ex rel. Crawford v. Norris,* 37 Neb. 299,

55 N. W. 1086; *State ex rel. Bennett v. Barber,* 4 Wyo. 56, 96, 32 Pac. 14; *Owens v. State ex rel. Jennett,* 64 Tex. 500, 509; *Brown v. Williams,* 34 Neb. 376, 51 N. W. 851; *Bowers v. Smith,* 111 Mo. 45, 57; *State ex rel. Att'y Gen. v. Dillon,* 32 Fla. 545, 547, 14 South. 383; *People ex rel. Feeny v. Board of Canvassers,* 156 N. Y. 36, 52; *Bragdon v. Navarre,* 102 Mich. 259, 60 N. W. 277; *Miller v. Pennoyer,* 23 Oreg. 364, 31 Pac. 830. If that part of ch. 341, Laws of 1899, material to the issues, should receive the construction contended for by appellant it would be unconstitutional. *Stackpole v. Hallahan,* 16 Mont. 40, 40 Pac. 80; *People ex rel. Hirsh v. Wood,* 148 N. Y. 142; *In re Madden,* 148 N. Y. 136; *State ex rel. Wood v. Baker,* 38 Wis. 71, 86, 87; *State ex rel. Runge v. Anderson,* 100 Wis. 523, 530; *State ex rel. Briesen v. Barden,* 77 Wis. 601; *Dells v. Kennedy,* 49 Wis. 555; *Bowers v. Smith,* 111 Mo. 45, 20 S. W. 101; *Moyer v. Van de Vanter,* 12 Wash. 377, 29 L. R. A. 670; *State ex rel. Brooks v. Fransham,* 19 Mont. 273, 289, 290; *Spier v. Baker,* 120 Cal. 370, 375, 52 Pac. 659; *State ex rel. Van Ryn v. Horan,* 85 Wis. 94; *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 476; *Britton v. Board of Comm'rs,* 129 Cal. 337, 342–344; *Murphy v. Curry,* 137 Cal. 479; *De Walt v. Bartley,* 146 Pa. St. 529, 540; *Hornung v. Board of Canvassers,* 119 Mich. 51, 77 N. W. 446; *Schuler v. Hogan,* 168 Ill. 369, 48 N. E. 195; *Baker v. Scott,* 4 Idaho, 596, 43 Pac. 76–78; *Miller v. Pennoyer,* 23 Oreg. 364, 31 Pac. 830, 831; *State ex rel. Crawford v. Norris,* 37 Neb. 299, 55 N. W. 1086; *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376; *Milwaukee Co. v. Isenring,* 109 Wis. 9, 28; *State ex rel. Att'y Gen. v. Boyd,* 19 Nev. 43, 5 Pac. 735; *Wagner v. Milwaukee Co.* 112 Wis. 601; *Gilbert-Arnold L. Co. v. Superior,* 91 Wis. 353, 357; *State ex rel. Chase v. Rogers,* 10 Nev. 250; *Smith v. Sherry,* 54 Wis. 114; *Vinsant v. Knox,* 27 Ark. 266; *Powell v. Jackson,* 51 Mich. 129. Where an opportunity is given to the candidate to have the

ballot properly made up before election, and he is in possession of all the facts and chooses to wait until after election and when defeated at the polls seeks to avoid the choice of the voters as expressed at the election, his action comes too late and he is estopped and cannot be heard to complain. *State ex rel. Crawford v. Norris,* 37 Neb. 299, 312, 55 N. W. 1086; *State ex rel. Brooks v. Fransham,* 19 Mont. 273, 288, 289; *Reg. ex rel. Harris v. Bradburn,* 6 Ont. Pr. Rep. 308. See also many cases cited in note in *Bowers v. Smith,* 16 L. R. A. 755; *State ex rel. Bennett v. Barber,* 4 Wyo. 56, 97, 32 Pac. 14; *Tutt v. Hawkins,* 53 Neb. 367, 73 N. W. 692; *Allen v. Glynn,* 17 Colo. 338, 15 L. R. A. 743; McCrary, Elections, p. 512, § 705; *State ex rel. Wood v. Baker,* 38 Wis. 71; *Baker v. Scott,* 4 Idaho, 596, 43 Pac. 76–78; *Bowers v. Smith,* 111 Mo. 45, 56; High, Extra. Leg. Rem. § 646 and notes.

Cassoday, C. J. It is urged on the part of the relator that the democratic mass convention which nominated the defendant as its candidate for sheriff was an unlawful gathering, held in violation of ch. 341, Laws of 1899; that, being unlawful, there was, in fact and law, no nomination made by that convention, and consequently that the ballots cast for the defendant were improperly canvassed and should be disregarded. Omitting what is not here applicable, the particular provisions of the act relied upon declare that:

"Caucuses and meetings of political parties held for the purpose of nominating candidates or choosing delegates to assemble in convention to nominate any person for any public office, to be voted for at any general . . . election . . . and all meetings for nominating candidates or choosing delegates to conventions to nominate candidates to be voted for at such elections, *commonly called caucuses* unless held under the provisions of this act, are hereby declared to be *unlawful,* and no political party shall have its political ticket *placed upon the official ballot, or canvassed* at such election, unless

the nomination of its candidates are made in accordance with the provisions of this act."

It is claimed that these provisions are mandatory and constitutional, and that they were improperly disregarded by the trial court.

Counsel for the defendant make two answers to such contention. One is to the effect that if the act must be construed as claimed on the part of the relator, then that it is repugnant to the constitutional right secured to every "qualified elector" to vote "by ballot" for sheriff and other county officers, and by implication prohibits the legislature from "excluding from the right of suffrage" any "qualified elector" except for crime. Secs. 1, 3, 6, art. III, Const., and sec. 4, art. VI, Const. The other answer is to the effect that the whole act, when fairly considered, only relates to the election of delegates and caucus conventions, and has no reference to mass conventions, such as nominated the defendant, and that this is especially so when considered in the light of other legislation on the subject.

Such legislation seems to have commenced in 1893. In that year the legislature passed an act entitled "An act to regulate caucuses and conventions," applicable, however, only to Milwaukee county. Ch. 249, Laws of 1893. A few days afterwards the same legislature passed an act entitled "An act to consolidate and revise the statutes of the state, relating to general elections, the conduct, canvass and returns of the same, and to secure the secrecy and purity of the ballot, and for other purposes." Most of that act is still in force, as will be found by reference to secs. 12–94*j*, Stats. 1898. Ch. 288, Laws of 1893. Two years afterwards another act was passed entitled "An act to regulate the nomination of candidates," applicable, however, only to Milwaukee county. Two years afterwards another act was passed entitled "An act to regulate the nomination of candidates," and relating to "caucuses and meetings of political parties . . . commonly called

caucuses." Ch. 312, Laws of 1897. That appears to have been the first act regulating such caucuses and political meetings outside of Milwaukee county. That act was continued, in a modified form, as secs. 11*a* to 11*i* of chapter 5 of the Statutes of 1898. The title of that chapter had previously been, "Of Electors and General Elections," but by reason of the new act relating to such "caucuses" the title was changed in the revision of 1898 so as to read, "Of *Caucuses,* Electors and General Elections."

Such were the general circumstances under which ch. 341, Laws of 1899, was enacted. The significance of that act is expressed in its title, which is, "*An act relating to caucuses,* and amending sec. 11*a* to sec. 11*i,* inclusive, of chapter 5 of the Statutes of 1898." As appears from the above quotation from the first section of the act, it deals with "caucuses and meetings of political parties . . . commonly called caucuses." It defines caucuses, and prescribes the manner of calling them and the length of time they shall be held open. Sec. 1. Every political party desiring to nominate candidates as therein provided is required to do so in the manner therein prescribed. Sec. 2, Id. It requires the respective committees to determine when and where the conventions of the political party it represents shall be held, and also the day upon which the caucuses of such political party shall be held. Sec. 2, Id. Every section of the act pertains to caucuses. At all caucuses held under the provisions of the act all votes are to be by ballot. The duties of caucus officers and the canvass of votes cast at caucuses, and the manner of certifying the result, are prescribed, and punishment for bribery and failures of duty is provided. The act only provides for the amendment of the provisions of the statutes relating to caucuses. Ch. 341, Laws of 1899, made no reference to sec. 30, Stats. of 1898, which provides that "candidates to be voted for" at general elections "may be nominated . . . by a convention or primary meeting held for the purpose,

consisting of an organized assemblage of electors," and so it makes no reference to sec. 31, Stats. 1898, which provides for certifying the result of "nominations made by a convention;" nor does it make any reference to sec. 40, Stats. 1898, prescribing the form of official ballots, nor sec. 41, providing for the preparation of official ballots and the voting and the counting of the same. True, the twelfth section of ch. 341, Laws of 1899, expressly repeals the nine sections of the Statutes of 1898 relating to caucuses, thereby amended, and also repeals all acts and parts of acts in conflict with the provisions of that act; and it is claimed that secs. 30 and 31, and 40 and 41, Stats. of 1898, mentioned, are to a certain extent in conflict with the first section of that chapter, wherein it declares that "no political party shall have its political ticket placed upon the official ballot or canvassed at such election, unless the nomination of its candidates are made in accordance with the provisions of this [that] act." If the act is confined to "all meetings for nominating candidates or choosing delegates to conventions to nominate candidates to be voted for at such elections, *commonly called caucuses,*" then there is no such conflict. On the other hand, if it is to have the broad and sweeping construction contended for by counsel for the relator, and does include such mass conventions as nominated the defendant, then there is much force in the contention.

But there are other reasons why the act should not have such broad construction. The next day after the governor approved ch. 341, Laws of 1899, he approved another act, entitled "An act relating to the form of official ballots for general elections, and amending secs. 37, 38, 40, 51, 52 and subds. 1 and 3, sec. 57, Stats. 1898," being ch. 349, Laws of 1899. If secs. 30, 31, and 41, Stats. 1898, mentioned, are to be regarded as amended by implication, as claimed by counsel for the relator, then it is singular that no reference was therein made to either of those sections in a chapter ex-

pressly amending six other sections of the Statutes of 1898 upon the same subject. If the contention of counsel for the relator is correct, it is still more singular that on the next day after the governor approved ch. 341, Laws of 1899, he approved another act [ch. 351, sec. 2], wherein sec. 30, Stats. 1898, was expressly amended by changing the word "two" in the latter part of the section to "one" leaving the section to continue to declare, as before, that:

"Candidates to be voted for at the elections to which this title applies may be nominated. . . . by a convention or primary meeting held for the purpose, consisting of an organized assemblage of electors."

Two years after that enactment, the legislature passed an act entitled "An act to amend sections 36, 37, 38 and 40 of the Statutes of 1898, as amended by chapter 349 of the Laws of 1899, relating to the form of official ballots for general elections," being ch. 457, Laws of 1901; and yet no reference was made therein to secs. 30, 31, or 41 of the Statutes of 1898. Besides, in construing a statute, regard is to be had to its purpose and object.

One of the objects of such caucus statutes manifestly was to secure to every political party having one per cent. of the entire vote cast in the county a place on the official ballot for the election of county officers. The statute goes further, and "in case of a division in any political party, and a claim by two or more factions thereof to the same party name," makes provision for securing a place on the official ballot by each of such factions. Sec. 35, Stats. 1898. In the case at bar there was no such division of the democratic party in Adams county. Nor was there any controversy as to the official ballot. That ballot was prepared by the county clerk in the form and in the manner prescribed by law. The name of the relator was upon it as the republican candidate for sheriff, and the name of the defendant was upon it as the democratic candidate for sheriff. All parties and all electors, appar-

ently, were satisfied with the official ballot as thus prepared and presented for use at the election. The defendant received not only a plurality of 118 votes, but also a majority of eighty-seven of all votes cast for sheriff. Upon the facts found, we must hold that mass conventions provided for by sec. 30, Stats. 1898, were not abolished by ch. 341, Laws of 1899, and that the name of the defendant was properly on the official ballot as the candidate of the democratic party for the office of sheriff, and he was duly elected and qualified as such sheriff.

This makes it unnecessary to consider whether ch. 341, Laws of 1899, would have been constitutional if construed as contended for on the part of the relator.

By the Court.—The judgment of the circuit court is affirmed.

MARSHALL, J. I concur in the affirmance of the judgment appealed from, but dissent from the reasons given in the opinion of the court. To my mind it seems plain that in ch. 5, Stats. 1898, was a complete scheme for the nomination of party candidates so as to entitle them to have their names placed on the official ballot, and for the preparation of official ballot forms and the use thereof by the electors. Sec. 30, though not using the name "caucus," used what was understood to be an equivalent thereto and what was intended to include all methods of nominating party candidates that should be deemed lawful. Ch. 341, Laws of 1899, deals with the same subject. It contains a complete scheme in respect thereto as regards the nomination of party candidates, and repealed all acts and parts of acts in conflict therewith except as regards counties having a population of 200,000 or more, and contained this unmistakable language as to whether it was exclusive or not:

"No political party shall have its political ticket placed upon the official ballot, or canvassed at such election, unless

the nominations of its candidates are made in accordance with the provisions of this act."

By ch. 349, Laws of 1899, a companion law, ch. 5 of the statutes, aforesaid, in respect to the official ballot, was amended, revised, and re-enacted. By what authority can the court change the prohibition referred to, made, as it is, in language as plain as English words can express it, by reading out of sec. 30, Stats. 1898, a method for making party nominations not found in the act of 1899, and add it to the prohibitory clause thereof? I know of none. If the court may thus enter, as it seems it does, the domain of legislation, and make a good law out of a bad one, then the declaration often found in our books, on the subject of the function of the court being confined to a declaration of the law and the enforcement thereof, not the making of the same, should be materially modified. I confess that this method of treating the subject is not legitimate if the law of 1899 is open to construction. My brethren assume that it is. I am entirely unable to look at it that way. They refer to the approval by the governor of ch. 349, Laws of 1899, the day after his approval of ch. 341 aforesaid, as evidence that it was not intended by the latter to change that feature of sec. 30 of the statutes, upon which reliance is placed by appellant. But it is easily seen, as before indicated, that the two acts were companions. One related to the method of making party nominations in order to entitle the nominees to have their names placed upon the official ballot; and the other revised, amended and re-enacted the existing law on the subject of such ballot. Both together merely cover those two subjects in a different form than they were covered by ch. 5 of the statutes. The obvious reason why sec. 30 was not otherwise referred to than by the prohibitory and general repealing clauses, is because it also covered the subject of individual nominations, which was not disturbed by the new law.

Reference is made to the fact that the day after the ap-

proval of ch. 341, ch. 351, Laws of 1899, was also approved, wherein sec. 30 was amended by changing the word "two" to the word "one," no other reference to said section being made. I hardly think my brethren would have given any significance to that circumstance had they observed, as the fact is, that ch. 351 was an act prepared by the revisors and introduced early in the session of 1901 for the purpose of correcting errors in the published statutes, and that the change referred to was not in that part of sec. 30 material to this case, but in the last part thereof, which relates to the subject of evidence as to whether a party, seeking to have the names of its nominees placed upon the official ballot for any election, polled one per cent. of the entire vote cast at the previous election.

It is said that the obvious purpose of ch. 349, Id., was to secure to every political party casting one per cent. of the votes at any election the right to be represented upon the official ballot at the succeeding election by complying with the law in respect to making nominations, indicating that it was not the legislative purpose to change that part of sec. 30 under discussion. Why so? we may well inquire. My brethren do not seem to say why. I see no reason why such purpose is significant at all, since the same feature was fully covered by ch. 5 of the statutes. Nothing in that regard was added to existing laws by the new act. A new method of securing such purpose was provided for. That is all. I cannot understand how any significance whatever can be legitimately attributed thereto.

Again it is said that by ch. 457, Laws of 1901, the legislature acted on the subject of the form of the official ballot, without referring to sec. 30 of the statutes, and that such circumstance is significant. Why so? The subject of the law of 1901 did not relate to the manner of making party nominations at all. It was confined to the form of the official ballot. It was amendatory of ch. 349, Laws of 1899, as the

latter law was of ch. 5 of the statutes on the same subject. Neither had anything whatever to do with the necessary way of making party nominations.

The act of 1899, as above indicated, provided how party nominations should be made, expressly declaring that if made in any other way they should be deemed unlawful and the ticket should not rightfully have a place on the official ballot; and that if wrongfully placed thereon it should not be canvassed. That act should be taken as the legislature made it, since it is so plain as not to be open to construction under the rules covering that subject. The responsibility therefor, if it is unreasonable or violates constitutional limitations, should rest where it belongs. One feature which is vital to this case, in my view of it, is that by which the legislature attempted to so provide that the votes of electors, though honestly cast in the manner provided by law, without any notice to them of any infirmity in the execution thereof, should be rejected as void in case of their being for party nominees whose names appeared in due form on the official ballot, if for some want of compliance with the statutory requisites in that regard they were not entitled to be there, notwithstanding the fact of the ballot being placed before the voter by state agencies as being in all respects in conformity with law. The voters, in the instance before us, were compelled to make their ballots by using the form provided for them, and to treat such form, in expressing their will, in the precise manner therein indicated. Having done so, I think, barring fraud participated in by such voters, all questions as to the right of the party voted for to have his name upon the ballot are foreclosed. They cannot, after the votes are cast, be inquired into for the purpose of nullifying the voters' will. So far as the law in terms declares otherwise, it is a palpable violation of the constitutional right of every voter to cast his vote for whomsoever he sees fit, and to have it counted. The decisions elsewhere to that effect, so far as they go, in my judg-

ment, are sound beyond reasonable controversy, *Tutt v. Hawkins,* 53 Neb. 367; 73 N. W. 692; *Bowers v. Smith,* 111 Mo. 56, 20 S. W. 101; *Baker v. Scott,* 4 Idaho, 596, 43 Pac. 76.

The spirit of the above decisions, which I heartily indorse, is well stated in McCrary on Elections, § 706, cited by appellant, thus:

"These decisions proceed upon the principle that, in the absence of fraud, the voter who has had nothing to do with the preparation of the ballot, nor with matters preliminary to the election, should not be deprived of the right to have his vote counted because of the errors or wrongful acts of election officers."

The adjudications thus far on the subject, though going in the main upon rules of construction or the doctrine of estoppel, as to contesting candidates for the office, might well be put upon the higher ground that the constitutional right of the elector to participate with effect in elections, so far as having his choice of candidates regarded, is so far removed from legislative interference that he cannot rightfully be required, by any legislative act, to use a particular form in a particular way for indicating his choice, and thereafter have that choice disregarded because, perchance, of its being in favor of one whose name was not rightfully on the ballot form placed in his hands as correct; the wrong of the matter being wholly chargeable to public agencies. The feature of the act of 1899 attempting to do that, and upon which appellant relies, should be condemned as not law, though it is such in form. The right of suffrage is not a creature of the legislature, nor subject to its interference except by reasonable regulations to secure its safe, honest, intelligent, independent, unbiased exercise. Some regulations are necessary to the effectiveness of the constitutional guaranty, and of course are legitimate. However, attempts, under the guise of regulating the exercise of the elective franchise, which go beyond

that field and materially embarrass the enjoyment of the right or destroy it, are not legitimate. They are not permitted by the constitution to be effective and will receive prompt condemnation by the court if it efficiently performs its functions as guardian of constitutional guaranties. *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482. That principle was most vigorously declared by this court in *State ex rel. Wood v. Baker,* 38 Wis. 71. Nothing need ever be added to it. To prevent effective legislative encroachment upon the constitutional right of the elector, we need but to firmly apply it. The court, by RYAN, C. J., in that case, said, in part:

"The constitution vests every person having certain qualifications at the time of any elections with the right of suffrage at such election. . . . Every one having the constitutional qualifications then, may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him. . . . Statutes cannot impair the right, though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election;" the theory thereof being "to guard against the abuse of the elective franchise, and to preserve the purity of elections."

Speaking with regard to the effect of failure of public officers to properly execute the registry law prior to the election, upon the voter's right, he said, substantially: If he were by the act made responsible for its execution so as to lose his right by nonfeasance or misfeasance of the public officers, of which he had no notice, it might be impossible to sustain it. Such nonfeasance or misfeasance could have no effect to impair a personal, vested, constitutional right.

Applying the foregoing to the facts of this case, the votes cast for respondent were properly counted, regardless of the prohibition in the law of 1899 to the contrary. They were the result of the exercise of the elective franchise in the only manner permitted by law. The ballot form used was in effect

guaranteed by the state to be correct. That was assented to, likewise, by the relator, till his objections thereto could not be made effective without defeating the will of the voters. That cannot rightfully be done.

KURZ, Respondent, vs. KURZ and another, Appellants.

December 12, 1903—January 12, 1904.

Equity: Quieting title: Evidence: Setting aside sheriff's sale on execution.

Upon sufficient evidence showing that the plaintiff was unable to read or write the English language; that the land in question was bought with plaintiff's money exclusively; that, though the title was in her husband's name for a considerable time, plaintiff did not know of or consent to such holding; and that as soon as she learned of the fact the title was transferred to her, a judgment removing an apparent cloud upon her title, caused by a judgment obtained against her husband when the record title was in his name, and setting aside a sheriff's certificate of sale upon such judgment, is plainly right.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the briefs of *Gary & Forward,* and for the respondent on that of *John Bottensek.*

WINSLOW, J. There are no legal principles to be settled in this case; hence any detailed statement of facts is unnecessary. The action was brought by a married woman to remove an apparent cloud upon her title to real estate, caused by a judgment obtained against her husband when the record title was in his name, and to set aside a sheriff's certificate of sale upon such judgment. The court granted the relief sought upon sufficient evidence showing that the plaintiff

was unable to read or write the English language; that the land in question was bought with her money exclusively; that, though the title was in her husband's name for a considerable time, the plaintiff did not know of or consent to such holding; and that as soon as she learned of the fact the title was transferred to her. Upon these facts the judgment was plainly right.

By the Court.—Judgment affirmed.

SCHRUNK, Respondent, vs. TOWN OF ST. JOSEPH, Appellant.

December 14, 1903—January 12, 1904.

Highways: Personal injuries: Negligence: Contributory negligence: Ordinary care: Special verdict: Questions submitted: Direction of verdict: Instructions to jury.

1. It is not consistent with ordinary care for one, with knowledge of the facts, to attempt to travel with horse and carriage over a section of a highway many rods in length, the pathway being on a narrow dirt fill six feet high, covered by water to a depth of about three feet, entirely obstructing it and all objects that would otherwise suggest with some reasonable certainty the location thereof.
2. In an action for damages alleged to have been caused by the insufficiency of a highway, an issue being raised by the pleadings and the truth of the matter controverted on the evidence as to such insufficiency being the result of an extraordinary event, as a sudden and extraordinary accumulation of water, such issue, upon a special verdict being demanded, should be submitted for determination by a proper question.
3. The duty of a municipality to keep its highways in a reasonably safe condition for public use does not include providing against insufficiency caused by extraordinary events.
4. In an action for damages alleged to have been caused by the insufficiency of a highway, the evidence disclosing conclusively that the condition causing the injury was produced by some extraordinary event, as an unusual accumulation of water, a verdict of no cause of action should be directed on a motion being made therefor.

5. A person of ordinary care may not always exercise it; hence, whether such a person would or might on a particular occasion conduct himself in a particular way, gives no legal criterion by which to determine whether such conduct would be consistent with such care. The true test is, Would a person of ordinary care under the same or similar circumstances ordinarily so conduct himself?
6. In an action for damages alleged to have been produced by the insufficiency of a highway, where contributory negligence of the plaintiff and of some other person, imputable to him, are in issue, the controversy as to such fault as to each should form the subject of an independent question upon the case being submitted for a special verdict.
7. The instructions to the jury in respect to questions for a special verdict should be directed thereto specifically and be confined to such explanation thereof and the law in respect thereto as to enable the jury to intelligently answer them, having regard to the burden of proof, care being exercised not to suggest, as to any question, the effect of the answer thereto upon the ultimate rights of either party.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

Action for damages said to have been caused by insufficiency of a highway in the defendant town. The insufficiency claimed was this: At the place of the accident the circumstances were such that surface water, to a depth of nine or ten feet measuring from the natural surface of the ground, and to a depth of three or four feet measuring from the surface of the made roadway, was liable to accumulate, covering the entire way for a distance of about eight rods; and to render travel practical at all times the defendant constructed a dirt fill about six feet high and six feet wide on top, without railings, the material of the fill being of such character that the action of the water thereon was liable to make deep holes in the sides thereof.

The circumstances of the accident were stated to be these: On April 11, 1897, water covered the fill mentioned to a depth of three or four feet, entirely obscuring the pathway

of public travel, which condition was well known to the town authorities. On such day plaintiff, in the company of her husband, while riding in a buggy and attempting to ford the pond by traveling on the fill, was severely injured by the buggy being overturned, throwing her into deep water. Damages were claimed in the sum of $5,000.

Defendant answered, pleading, among other things, that the damages were solely caused by contributory negligence of the plaintiff. The evidence was to the effect, beyond reasonable controversy, that the condition of the highway and the circumstances of the accident were substantially as set forth in the complaint; that plaintiff and her husband were perfectly familiar with the highway and the dangers of attempting to pass over the same as they did; that the highway had been dangerous on account of the accumulation of water covering the same for several days prior to the accident; that the accumulation of water was extraordinary, and that there was a way by which plaintiff could have safely made her journey without taking the risk which terminated in the injury complained of.

At the close of the evidence defendant's counsel moved the court to direct a verdict in its favor, which motion was denied. Defendant's counsel then demanded a special verdict, asking that questions be submitted covering the subject of whether the accumulation of water at the time of the accident was extraordinary, and whether there was a way known to plaintiff by which she could have safely reached her destination. The jury rendered a verdict as follows:

The highway at the place where and time when plaintiff was injured was insufficient for public use.

Defendant had notice thereof so that by the exercise of reasonable diligence it might have remedied the defect before plaintiff was injured.

Such insufficient condition was the proximate cause of the plaintiff's injury.

* Schrunk v. St. Joseph, 120 Wis. 223.

She was not guilty of any want of ordinary care contributing to produce it.

Four hundred and seventy-five dollars will be required to compensate plaintiff therefor.

Upon exceptions taken during the progress of the trial and to the refusal of the court to submit to the jury propositions requested, and to its instructions to the jury, defendant moved that the verdict be set aside and a new trial granted, which was denied. Upon plaintiff's motion judgment was rendered in her favor upon the verdict, and defendant appealed.

For the appellant there was a brief by *John W. Bashford* and *Spencer Haven,* and a supplemental brief signed also by *R. M. Bashford,* of counsel, and oral argument by *Mr. R. M. Bashford.*

A. J. Kinney, for the respondent.

MARSHALL, J. If the evidence in this case conclusively shows contributory negligence on the part of respondent, as counsel for appellant claim, sustaining their contention that the trial court erred in refusing to grant their motion for a directed verdict and their contention that the one rendered, exonerating respondent from the charge of contributory negligence, is contrary to the evidence, then there is little need of discussing any other subject in this opinion; since, though in that event, as the record stands, the cause must go back for a new trial, it does not seem probable that a second trial in fact would profit respondent.

As indicated, the main proposition to be solved is this: Is it consistent with ordinary care for a person riding in a buggy, drawn in the usual way, to attempt to pass over a section of highway where the traveled track for many rods is on a narrow dirt fill so high that to drive off the side thereof would be attended with great danger, the top of the fill being curved and so narrow that a mere step by the horse outside such track would be liable to carry him and the occupants of

the conveyance into the region of such danger, there being an accumulation of surface water covering the fill to a depth of some three or four feet, entirely obscuring from observation not only the top thereof but all fence posts and other objects in the vicinity that might otherwise suggest the location of the traveled track, the depth of the water at the side of the fill being eight feet or more, and all such facts being within the knowledge of such person? It seems that none but a negative answer can reasonably be given to such proposition, and therefore that no disputable question of fact in respect to the subject existed on the evidence calling for solution by a jury. Where in such cases as this conflicting inferences may reasonably be drawn from a given state of facts, the truth of the matter is to be discovered by a jury; but where only one such inference can be drawn the true state of the case, in legal contemplation, appears as a matter of law, calling for the exercise of the judicial function to so declare it. It is plain that the driver in this case could place no reliance on his horse to keep safely in the traveled track, as the animal had no way of knowing where it was or that he was departing dangerously therefrom, at least till he approached the very brink of the fill, where he was quite likely to so lose his footing as to be unable to avoid going into the deep water at the side thereof. The driver had no way of safely guiding his horse so as to keep him in the proper course, because of the form of the fill and inability to tell with reasonable certainty its location by observing it or surrounding objects. It seems that the common sense of any one of ordinary intelligence would suggest at once, in the circumstances stated, imminent danger of personal injury as incident to an attempt to drive through the pond.

Great reliance is placed by respondent's counsel on *Jung v. Stevens Point,* 74 Wis. 547, 43 N. W. 513. It is sufficient to say that the circumstances involved there included the existence of a fence parallel with the traveled track and ap-

pearing above the surface of the water, indicating with reasonable certainty the location of the traveled track. It might be suggested that *Wiltse v. Tilden,* 77 Wis. 152, 46 N. W. 234, has some bearing, but it will be seen by an examination of the facts involved that there was nothing to prevent the traveler from seeing just where the traveled track was located, and that the horse was proceeding thereon where the water was only a little above ankle deep at the instant when it reached the brink of a hole, washed out in the road, of which the driver had no knowledge, into which he stepped. *Wells v. Remington,* 118 Wis. 573, 95 N. W. 1094, recently decided, is quite like *Wiltse v. Tilden,* and significantly unlike this case. There was evidence tending to show that the traveler was able to and did keep in a track commonly used and apparently safe up to the instant of the accident; that he was proceeding on dry land when the horse, by reason of slipping, or the caving away of the side of the road where it was undermined by water, a condition not reasonably to be apprehended, was caused to slide or fall into deep water. We are not familiar with any instance where a person, traveling as plaintiff and her husband were, with full knowledge of all the facts, was held to have acted consistently with ordinary care in attempting to drive for several rods on a narrow, crooked bank of earth, covered by water entirely obscuring it from observation, and all objects on either side thereof as well that would otherwise indicate its precise location, and rendering it uncertain at every step of progress whether such step would be on or off the bank.

The foregoing renders other questions discussed in the briefs of counsel of little importance; but for the beneficial influence that a brief mention of them may have on future trials in the same jurisdiction we will notice them.

There was much evidence tending to show that the condition of the highway at the time of the accident, as regards water, was extraordinary. That was an important feature

of the case. The fact in regard thereto was in issue by the pleadings. It was one of more significance than a mere evidentiary circumstance bearing on the question of whether the highway was reasonably safe or not. It was, if it existed, one which the town authorities were, as a matter of law, not bound to provide against. If the trial court deemed it established beyond reasonable controversy, a verdict for appellant should have been directed. *Hopkins v. Rush River,* 70 Wis. 10, 34 N. W. 909, 35 N. W. 939; *Allen v. Chippewa Falls,* 52 Wis. 430, 9 N. W. 284. If upon the evidence a disputable question was presented in respect to the matter, the trial court should have submitted it specially to the jury in the special verdict, as requested. *Hopkins v. Rush River, supra.* The court seems to have arbitrarily adopted the form of the special verdict suggested by this court in *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816, not considering that, while such form fits most cases, where there are special matters in issue under the pleading, questions in regard thereto should be added to the end that each such matter, controverted on the evidence, may be covered by an appropriate interrogatory.

The court correctly instructed the jury that the burden of proof on the question of whether plaintiff was guilty of contributory negligence was on the defendant. There is no exception to the rule in that regard, that where plaintiff's evidence tends to show contributory negligence on his part the burden is upon him to show that he was free from such fault, as counsel for appellant seem to suppose. *Hoyt v. Hudson,* 41 Wis. 111; *Prideaux v. Mineral Point,* 43 Wis. 524; *Hoth v. Peters,* 55 Wis. 410, 411, 13 N. W. 219, and *Strong v. Stevens Point,* 62 Wis. 265, 22 N. W. 425, upon which they rely for authority to the contrary, are merely to the effect that the burden to establish contributory negligence, in a case of this kind, is cast upon the defendant because of the presumption of law that every person acts with ordinary care in the absence of evidence to the contrary; hence when the

plaintiff's own evidence wholly overcomes such presumption and conclusively establishes contributory fault on his part, he must take up and carry successfully the burden of producing other evidence which, in view of the defendant's proof, will at least involve the question of whether there was such fault or not in some reasonable degree of doubt, calling for solution by a jury, or pay the penalty of being nonsuited, or having a verdict directed in favor of the defendant. The burden of proof in such a case is on the defendant at the start and is not shifted merely by the fact being established by his adversary in any other sense than it is as to any other fact in the case so established. If the plaintiff himself conclusively establishes a fact essential to the defense, he of course effectually accomplishes his own defeat. If he merely discloses evidence tending to establish such fact, the question in regard thereto is still for the jury to solve, guided by the rule that the burden of proof in regard thereto is on the defendant, who of course is entitled to have considered in his favor any evidence produced by his adversary to the latter's disadvantage.

The court instructed the jury in substance thus:

If you find that a person of ordinary intelligence and prudence would do what the plaintiff did, then she was free from contributory fault.

That was not a correct test of ordinary care, though we hardly see how reversible error can be predicated thereon, since the idea expressed to the jury was suggested to the court in several requests for instructions made by appellant's counsel. It is not true that a person of ordinary care is as a matter of law always to be deemed free from contributory fault as to everything which he does, since a person of common prudence may on occasions do very negligent acts. The proper standard by which to measure the conduct of a person in a given situation, in determining whether he was guilty

of contributory fault or not, is this: Would a person of ordinary intelligence and prudence, under the same or similar circumstances, ordinarily so conduct himself? The court gave the instruction here criticised several times, in one instance using this language:

"If under the same circumstances a person of ordinary intelligence and prudence would have ventured over such defective highway, then such traveler would not be held guilty of a want of ordinary care."

There the faulty idea was presented to the jury in a strikingly prejudicial manner by reason of the use of the word "venture." It must be clear that the fact that an ordinarily careful person might on some particular occasion "venture" to assume imminent risk of receiving a personal injury would by no means suggest that his conduct was consistent with ordinary care.

Complaint is made because the court did not submit to the jury, as part of the special verdict, a question covering the subject of whether plaintiff's husband was guilty of contributory negligence. That was a fact in issue and should have been covered by a question separate from that regarding the contributory fault of plaintiff. But since no special request in that regard was made by appellant's counsel, and the instructions given by the court were so worded as to make the answer to the question as to plaintiff's contributory fault cover that of her husband as well, and by the answer to the complaint the accident was alleged to have been caused solely by the contributory fault of the plaintiff, it does not seem that the error assigned can be sustained as prejudicial.

Complaint is made because the court at several points in the instructions to the jury so worded the same as to indicate the answer necessary to sustain plaintiff's claim. These instances are given to illustrate the fault suggested. In respect to the question covering the subject of whether the highway

at the time of the accident was reasonably safe, the court said:

"The law of this state is that towns and municipalities shall keep their streets and highways in a reasonably safe condition for the passage of travelers at all seasons of the year.

"The law does not require, nor does the town undertake to make its highways perfectly safe so that no accident can happen; but the town is required and it is its duty to make them in view of the situation, the character of the highway, and the season of the year, in a reasonably safe condition."

In regard to the question of whether plaintiff was guilty of contributory fault or not, the court said:

"It was the duty of the plaintiff in this case to exercise ordinary care to protect herself from injury; and you are required by your answer to this question to say whether she did, under all the circumstances shown in the testimony, exercise such ordinary care."

Without intending to indicate at this time that such a method of instructing a jury under the circumstances of this case is fatally erroneous, we will take occasion to condemn it as not the best method, and as impairing to some extent the value of a special verdict. True, as counsel for appellant argue, it was not necessary or best for the court, in instructing the jury as to the question covering the subject of whether the highway was reasonably safe or not, to say anything about what the law required of the town authorities; or, in instructing in respect to the question as to whether plaintiff was guilty of contributory negligence, to say anything about what the law required of her in that regard as a condition of her right to recover. As to the first subject mentioned the instructions might better have been confined to an explanation of what constitutes a reasonably safe highway, and a statement that the burden of proof was on the plaintiff to satisfy the jury that the highway in question did not come up to that standard. As to the second subject mentioned, the instructions might better have been confined to a clear state-

ment of what constitutes ordinary care, and an instruction that the burden of proof, to show that the person alleged not to have come up to that standard did not do so in fact, was on the party so alleging. Of course it was proper at some point in the instructions to explain the term "burden of proof" as used in respect to the questions. To give the special verdict statute the full beneficial significance which the law-making power designed it should have in the administration of justice, care should be taken not only to so frame the verdict that it will contain a question as to each material issue of fact raised by the pleadings and controverted on the evidence, and contain no other question, but to confine the instructions to such explanations of such questions, directed thereto specifically, as will enable the jury to intelligently answer the same, leaving the legal result to be determined thereafter. It must be easily seen that a charge so framed as to inform the jury what will be the legal result of an answer one way or the other as to each question, comes dangerously near having the vice of a general charge in connection with a special verdict, which has been repeatedly condemned.

The foregoing covers all the questions which we deem of any special importance in the case in any view of it. The judgment must be reversed because the evidence shows conclusively contributory negligence on the part of the plaintiff.

By the Court.—The judgment is reversed and the cause remanded for a new trial.

KAISER, Appellant, vs. NUMMERDOR, Respondent.

December 14, 1903—January 12, 1904.

Sales: Deceit: Fraudulent representations: Evidence: Special verdict: Instructions to jury.

1. In an action for deceit, based on fraudulent representation as to the total footing of an inventory of a stock of goods sold to plaintiff by defendant, the evidence, stated in the opinion, examined and *held* to support a negative answer to a question in the special verdict: Did the plaintiff, under all the facts and circumstances of the case, as an ordinarily prudent man, have the right to rely upon such representations to be true?
2. In such case, the only artifice suggested was a change in the first figures of the totals from "6" to "8," and it was in dispute whether defendant made or knew of the change, and also whether it was not such an obvious alteration of a previous figure as to at once attract plaintiff's attention and suggest inspection. *Held*, that it could not be said that there was no evidence which, if believed by the jury, might have warranted a negative answer.
3. It is ordinarily essential in one seeking relief from fraud, whether by damages or rescission, to see that which is apparent, if, knowing it, he could not have been deceived by defendant's misrepresentations, and hence, in an action against one who has wilfully deceived him, the question of plaintiff's diligence is properly a question to be submitted to the jury.
4. It is not error to instruct the jury that the degree of diligence essenial in the presence of actual fraudulent representation (as where, in the purchase of a stock of goods, the footing of the inventory is represented to be that shown by the change of the first figure of the totals from "6" to "8"), is such as ordinarily careful and prudent persons exercise under like circumstances, where it appears that plaintiff was a man of exceptional shrewdness, alertness and experience in the buying and dealing in stocks of goods.
5. It is the duty of a purchaser of goods upon the representations of another, if he has full means of knowledge by the exercise of ordinary attention to business, to at least look at what he buys, so as to observe patent defects, if there are any such.
6. Plaintiff, in an action for deceit, was shown to be a man of at least ordinary intelligence and acuteness, and to have had present the means of discovery of the falsity of the representation

relied upon. The court instructed the jury that the plaintiff was required to exercise ordinary care and prudence in the matter at issue. *Held*, that while the use of the expression "ordinary attention" would have been better, in its relation to the facts in the case, the instruction cannot have misled the jury as to the law.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action for damages from deceit inducing plaintiff to purchase a stock of boots and shoes at an agreed value of $7,000. The jury found by special verdict that the defendant falsely represented to the plaintiff that such stock inventoried at the amount of $8,500 by the inventory made by one Klug, with the intent and object to induce plaintiff to rely upon it as true and to purchase; that the plaintiff understood and believed such to be the fact, and was thereby induced to buy the stock. The inventory in fact footed $6,531. The difference in value between the goods in fact and if they had been as represented was $1,846.15. But they also found, in answer to the fourth question, that "the plaintiff, under all of the facts and circumstances of the case, as an ordinarily prudent man, [did not] have the right to rely upon such a representation as true." The charge on this subject was as follows—excepted portion in parentheses:

"(In passing upon this question, you are to keep in mind that, in law, the plaintiff is required to exercise ordinary care and prudence in the matter at issue. He must exercise such care and prudence, and give such attention to the particulars of the transaction pending, as ordinarily careful and prudent persons exercise under like circumstances. Under this rule, he is not permitted to willfully disregard or negligently omit to avail himself of information at hand, and accessible to him, giving the true state of facts complained of as false and fraudulent.) As to the defendant, the seller, the law imposes the duty that he do not employ any art or practice any artifice to conceal or misrepresent the facts, or do any act to throw the plaintiff off his guard, or prevent him

from using any means at hand to give him the correct information pertaining to the alleged false representation."

The plaintiff moved to set aside the answer to question 4, and also moved for a new trial, which motions were overruled; and a motion for judgment for defendant on the verdict was granted, and judgment entered, from which the plaintiff appeals.

For the appellant there was a brief by *Bashford, Aylward & Spensley,* and oral argument by *R. M. Bashford*

H. W. Chynoweth, for the respondent.

DODGE, J. The first position assumed by appellant is that there was no evidence to support a negative answer to question 4 of the special verdict. The representation was that Klug's inventory showed a total value of $8,531. Upon reaching the store where the goods were, plaintiff—who, by the way, was quick at figures, familiar with inventories, and largely experienced in estimating and buying stocks—asked for that inventory; and it was delivered to him, and retained a considerable time, while he selected numerous illustrative items, and examined the particular goods represented thereby, with the aid of his shoe expert, in order to ascertain the basis of valuation adopted by Klug. This inventory consisted of twenty pages of detail items, each page footed separately, none exceeding three figures of dollars. On the last page these respective twenty footings were brought together in one column, and there footed to an original total of $6,531. All this in pencil. There is evidence that the "6" had been changed to "8" when plaintiff had the book, though the defendant denies that he ever changed it or knew of its change, and inferentially denies that it then was an "8." At the trial the first figure was "6," obviously written upon an erasure. The evidence thus shows that plaintiff had full and complete means of knowledge of the true total of the inventory at the expense of only the effort of adding up the column

of twenty items. He could have discovered that $8,500 was clearly incorrect and excessive by merely running his eye over the column of hundreds, as it appears did one Straus, with whom defendant negotiated. This would have shown but about $5,500, and would at once have suggested that the odd amounts less than $100 could not bring the total up to $8,500. The question, conceding the "8" was in fact there, whether the incorrectness of the total was so obvious that plaintiff ought to have observed it, was one open at least to an affirmative inference, and was properly for the jury. But counsel urges, and properly, that if defendant, by artifice, threw plaintiff off his guard, or diverted him from observing that which he had opportunity to observe, then the fourth question of the verdict must be answered in the affirmative. Upon this branch of the subject not only is the inference deducible from the facts doubtful, but the evidence itself is in some measure of confusion and conflict. The only artifice suggested is the change in the first figure of the total. Whether defendant made that change or knew of it is in dispute; also whether it was not so obviously an alteration of a previous figure as to at once attract plaintiff's attention and suggest inspection. Hence we cannot say that there was no evidence which, if believed by the jury, might have warranted them in a negative answer to the question submitted.

The next contention, broadly stated, is that the fourth question to the jury and its answer have nothing to do with defendant's liability; that diligence in a defrauded person is in no wise essential to his recovery against one who willfully deceives him. In other words, that the rule of *caveat emptor* has no place in the presence of actual fraud. Appellant also urges, however, that, even if the foregoing contention be not sustained to its full extent, the court, by the fourth question, and the charge with reference to it, imposed too high a duty of diligence upon plaintiff.

That some measure of diligence, or, rather, absence of af-

firmative negligence, is ordinarily essential in one seeking in court relief from fraud, whether by damages or rescission, has been so recently reiterated by this court in *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, and *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785, where a very complete collection of the authorities is made, that we cannot feel justified in any extended discussion of the subject now. It rests on the idea that one cannot be defrauded by an assertion of what he knows to be false, and that courts will presume that an ordinary person does know those things which are obvious to ordinary observation. It rests on the same reasons as the rule so well established in negligence cases, that courts will not deem credible a party's own testimony that he looked, and did not see that which must have been plain to his vision. *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295. Hence courts will deny relief to him who shuts his eyes to that which is clearly apparent, if, knowing it, he could not have been deceived by defendant's misrepresentation. *Locke v. Williamson,* 40 Wis. 377; *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167; *Prince v. Overholser,* 75 Wis. 646, 44 N. W. 775; *Farr v. Peterson,* 91 Wis. 182, 187, 64 N. W. 863.

When, however, we come to consider the degree of diligence essential in the presence of actual fraudulent misrepresentation, we find a multitude of at least apparently inconsistent and conflicting remarks or *dicta,* many of them doubtless correct enough as applied to the situation then in hand, but quite misleading as general rules of law. Expressions like "due diligence," "ordinary care," and the like, have been used, perhaps properly with only their intrinsic meaning, but rendered of doubtful propriety in view of the technical meaning which has become attached to such expressions in administering the law of negligence in other aspects. Both

the question to the jury and the instruction in the instant case suggest, at least, that recovery for deceit can be had only by one who has exercised the care of an "ordinarily prudent man." This obviously cannot be true as a general rule, for frauds are more likely to be effective, and even more certainly ought to be redressed, when practiced upon the weak-minded or the inexperienced; in other words, upon those who lack the prudence and intelligence of the ordinary person. "It is as much an actionable fraud willfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one." *Barndt v. Frederick,* 78 Wis. 1, 11, 47 N. W. 6, 9. The law has always been most vigorous in denunciation of fraud practiced on such incapables, but any redress would ordinarily be impossible, if, as a condition, the jury must find that the sufferer exercised ordinary care and diligence, according to the technical meaning of that phrase. Nevertheless such a question as that now criticised was fully approved in *Farr v. Peterson, supra.* In that case, however, all parties proceeded upon the assumption that the plaintiff was fully up to the ideal standard—the man of ordinary prudence. Where that appears conclusively, we are not inclined to hold it error to embody such a standard in the question by which to measure his conduct. If he be such a man, then he must be presumed to see and know that which under all the circumstances was apparent to ordinary intelligence and observation. In this case there exists even more justification for the use of such a standard of comparison, for it was proved conclusively that plaintiff was a man of exceptional shrewdness, acuteness, and experience in the buying and dealing in stocks of goods. He, with some modesty of expression, admitted upon the stand that, while there might be more competent and more experienced men in that line, none such had come within his acquaintance. So we conclude that the undisputed facts rendered permissible in this case the

comparison of plaintiff's conduct with that of ordinarily prudent persons, though a similar question might well be erroneous or inconclusive in the absence of undisputed showing as to plaintiff's competency.

Another criticism is upon the charge that "the plaintiff is required to exercise ordinary care and prudence." It is said that this conveys the idea, as a general rule, that one to whom statements of fact are made must always meet them with suspicion—must take at least some precaution to ascertain whether they may not be false. If that be its effect, it is incorrect. There is no rule of law demanding universally any such duty of suspicion. In absence of anything to put one on his guard, and in absence of full opportunity to observe and know the fact, he has the right to believe and rely upon representations of material facts made to him by the opposite party, and if they prove false and fraudulent, to demand relief from their effect. *McClellan v. Scott,* 24 Wis. 81, 86; *Birdsey v. Butterfield,* 34 Wis. 52; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406. It is in relation to this situation that the remark has often been aptly made that "the rule of *caveat emptor* has no application to cases of fraud." *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. For example, had plaintiff made this trade in Madison without sight of the goods or opportunity to see the inventory, upon defendant's statement that it footed $8,500, there probably would have been no question of ordinary care for consideration; he knowing nothing to arouse doubt of the statement, nor having any present means of knowledge as to the truth or falsity thereof. On the contrary, however, when the means of knowledge as to the true state of facts is so spread before him that by ordinary observation he cannot but know it, very different considerations are then involved. If he could not, without substantially closing his eyes to what is before them, be ignorant, he will be presumed to know, unless, indeed, he

be diverted from observation by some artifice or further misrepresentation. He cannot longer be supposed to rely on what is told him, but on what he sees and knows. When we enter this field, however, we are obliged to use terms and expressions not entirely exact in their signification. When we speak of a fact being obvious or open to ordinary observation, those expressions must cover a multitude of degrees of obviousness. Some things are, and some are not, so plain as to fall one side or the other of the legal line. Again, a thing may be obvious to one person, and not at all apparent to another. Hence attempt must be made to guide a jury as to how obvious must be the fact in order that the law will presume knowledge. Courts have used many different *formulæ* to define the duty of a purchaser when once the actual facts are spread open to his observation or discovery, so that he owes some duty even to himself; also of the conditions under which the presumption of knowledge will be indulged. Thus the original case in this court denies right of reliance "when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination." *Locke v. Williamson,* 40 Wis. 377, 379. "Fraud must be such that the party could not, with reasonable diligence, acquire knowledge thereof when put on inquiry." *Prince v. Overholser,* 75 Wis. 646, 650, 44 N. W. 775. The query, "Did plaintiff use due and proper caution and diligence in endeavoring to ascertain the true boundary?" was held at least sufficiently favorable to defendant in *Castenholz v. Heller,* 82 Wis. 30, 33, 51 N. W. 432. A party may rely "so far as falsity was not obviously discoverable." *Porter v. Beattie,* 88 Wis. 22, 32, 59 N. W. 499, 503.

"If plaintiff had notice of the actual facts, or had knowledge of such facts as would have led to the discovery of the truth by the use of reasonable diligence, and failed to use such diligence, she cannot now say that she was defrauded in the purchase. She cannot close her eyes to the facts which

are before her, or the information which is at hand." *Warner v. Benjamin,* 89 Wis. 290, 295, 62 N. W. 179, 180.

"The law requires men, in their dealing with each other, to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to means of information accessible to them." *Farr v. Peterson,* 91 Wis. 182, 187, 64 N. W. 863, 865.

One must be presumed to observe such things as "would ordinarily be observed by a person in handling his own property under the circumstances." *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. In the late case of *Northern S. Co. v. Wangard,* 117 Wis. 620, 94 N. W. 785, we took occasion to point out the erroneous character of an instruction which suggested a duty on the part of a buyer to suspect and search for a defect or variance from the fact as warranted or represented; and it was there reiterated that the rule of *caveat emptor* applies only "as to patent defects if the purchaser has full means of knowledge thereof by the exercise of ordinary attention to his business, which requires him to at least look at what he buys, . . . so as to observe patent imperfections, if there are such." In *Shaw v. Gilbert,* 111 Wis. 165, 188, 86 N. W. 188, this court apparently transported the complete doctrine of contributory negligence into the duty of a plaintiff to guard against belief in and reliance upon the willful fraud of defendant, and what was there said would inferentially support the instruction now under consideration. There is now discovered, however, a most unfortunate mistake in the statement of the error which was assigned, considered, and intended to be condemned in that case. For that mistake the writer of the opinion was responsible, and hastens to avail himself of this opportunity to make correction, so far as possible. The question of which exclusion from the special verdict was assigned as error was not whether the plaintiff was guilty of a slight want of ordinary care in relying upon or believing the alleged misrepre-

sentation, as incorrectly stated, but whether she was guilty of such want of care in extending credit to an insolvent corporation; in other words, in exposing herself to some or all of the damage which she claimed to have suffered. Obviously, therefore, the question actually decided in *Shaw v. Gilbert* was not that now under consideration, and that case is not authority upon this.

After thus reviewing the various cases upon the subject, it is apparent that the duty of a purchaser of goods upon representations of another is best and most nearly accurately expressed in terms such as those just quoted from *Northern S. Co. v. Wangard,* or in those from *Farr v. Peterson, supra.* The tendency observable in several recent trials at circuit to confuse the doctrine of contributory negligence as a defense to actions for negligence with the failure of a plaintiff to observe what is patent as an obstacle to recovery for willful fraud should at once be corrected, and the use of terms belonging to and having an exact and technical meaning in the former field should be avoided in charging juries with reference to the latter. It being conceded, however, that the instruction complained of in this case was unfortunate and to the professional mind might seem to import into this case the general rules measuring contributory negligence, yet it does not follow that the jury were necessarily misled to appellant's prejudice. We have already pointed out that the plaintiff being by conclusive proof a person of at least ordinary intelligence and acuteness, no error existed in the suggestion that the jury might consider his conduct on the assumption that he would observe and know what the ordinarily prudent and diligent man would under like circumstances. Further than this, it being shown conclusively that the inventory itself was placed in his hands and examined by him so that the amount of its total was apparent to at least some measure of observation, the question arose whether that degree of scrutiny which would have disclosed the falsity of

defendant's representation was so within "ordinary attention to his business" that a presumption of its exercise must be indulged, or its failure be deemed a closing of his eyes to that which was obvious. The trial court saw fit to describe this ordinary attention to business as "ordinary care and prudence." That phrase, while technical to a lawyer, would not necessarily be so to a layman, and may well have conveyed to the jury the same idea as the better and more guarded one, "ordinary attention." The phrase used is not erroneous in the ordinary and popular acceptation of its words, even though it might be in their technical meaning in the law of negligence. Doubtless the statement of a general rule that a purchaser upon representations owes a duty of such care and prudence as ordinarily careful persons exercise under like circumstances would be erroneous, as conveying the idea of duty to look out for fraud; but the instruction here was confined to the plaintiff, a man of fully ordinary prudence and caution, who had present to his eyes full information of the falsity of the representation. Hence, after some hesitation, we have reached the conclusion that, in its relation to the facts of this case, the instruction given was not so erroneous or misleading as to lead to the view that the answer to the fourth question was or might have been the result of a misapprehension of the law by the jury, and therefore cannot justify reversal.

By the Court.—Judgment affirmed.

SIEBECKER, J., took no part.

SCHROEDER, Appellant, vs. KLIPP, Respondent.

December 14, 1903—January 12, 1904.

Highways: Discontinuance: Lost record: Secondary evidence: Order of supervisors as evidence: Persons entitled to notice: Abutting occupants: Order: Validity: Stipulation in open court: Enforcement.

1. It being shown that an order discontinuing a highway was lost or destroyed, its contents can be established by secondary evidence, and being so established it is to have the same effect as though it had never been lost or destroyed.
2. Under sec. 1298, Stats. 1898 (providing that an order discontinuing any highway shall be *presumptive* evidence of the facts therein stated and of the regularity of all the proceedings prior to making of such order), an order discontinuing a highway does not raise a conclusive presumption that all requisite notices of the meeting of the board of supervisors had been given, but the presumption mentioned in the section may be overcome by evidence.
3. Under sec. 1267, Stats. 1898 (providing that on an application for the discontinuance of the whole or any portion of a highway, notice shall be given "to the occupants of all the lands abutting or touching on such highway, the whole or any part of which is sought to be discontinued"), when only a portion of a highway is sought to be discontinued, the occupants of lands abutting on the portion of such highway not sought to be discontinued are entitled to have notices served upon them.
4. It appeared, among other things, that the highway in question, part of which was alleged to have been discontinued, extended east and west between sections 3 and 10; that there was a north and south highway along the west side of said sections intersecting the same, and about eighty rods west of the northeast corner of section 10 a highway ran in a northwesterly direction. The portion discontinued extended west from the highway running northwesterly for about one third of the distance to the intersection with the north and south highway. *Held*, that occupants of the northeast quarter of the northeast quarter of section 9, and the southeast quarter of the southeast quarter of section 4, were abutting occupants at the west end of the highway, part of which was discontinued, and failure to serve them with notice as required by sec. 1267, Stats. 1898, was fatal to the proceedings.

5. In such case, failure of the supervisors *at the time of* making the order discontinuing such portion of such highway, to assess the damages which such abutting occupants sustained, or to procure their waiver or release or to file such award, waiver or release with the town clerk within ten days after their decision on the application, vitiated the proceedings.
6. In an action for trespass in removing fences, the defendant justified on the ground that the *locus in quo* was a highway. Before the introduction of any evidence the parties stipulated that "up to the time of the attempted discontinuance the *locus in quo* was a highway." After the trial had proceeded, including a considerable portion of the defense, plaintiff attempted to prove that the defendant, in removing the fence, "went outside of the old highway itself, as it formerly existed" and while he admitted "that there was travel over the place, and that a highway had been laid out there," yet he contended "that the highway as traveled was not the highway laid out." *Held*, that defendant having prepared his testimony and tried his case on the faith of the stipulation, it was not error to rule that such stipulation was binding on the plaintiff.
7. In such case, the mere fact that the highway as traveled was not the highway as laid out is not ground for claiming that the *locus in quo* is outside the highway.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action for trespass *quare clausum fregit,* commenced before a justice of the peace June 14, 1902. The defendant answered by way of admissions, denials, and counter allegations to the effect that the *locus in quo* was at the time in question a public highway; that the plaintiff willfully and without authority placed obstructions in the same, and the defendant, as overseer of the highways of the town, and as his duty required of him, removed such obstructions. The defendant thereupon gave the requisite bond, and the cause was removed to the circuit court. The cause having been reached for trial in the circuit court, and before any testimony was introduced, the following stipulation was entered into:

"It is admitted by both parties that up to the time of the attempted discontinuance the *locus in quo* was a highway. It

is also admitted that the title and right of possession to the land at that point is in the plaintiff, and that the fences that were on the premises were removed by the defendant at a certain time."

The evidence is undisputed, and to the effect that December 2, 1901, the chairman of the town board of supervisors received the following petition:

"To the Supervisors of the Town of Westfield in Sauk County, Wisconsin:

"We, the undersigned, freeholders and residents of said town, hereby make application to you to discontinue a highway in said town as follows: All that portion of road lying east of the residence of *Carl Schroeder* to the intersection of a road running northwest past the residence of George A. Meyer, all of said road asked to be discontinued is on the section line between sections three and ten.

"Dated at Westfield this 28th of November, 1901."

There were thirteen subscribers to that petition, including the plaintiff. According to the oral testimony, the town board held a meeting December 2, 1901, at the house of the town clerk, Fred Jiles. The board then agreed to meet at two o'clock in the afternoon of December 14, 1901, at the house of the plaintiff, to decide upon the petition. The town board met at the house of the plaintiff December 14, 1901, pursuant to notice prepared by the town clerk, as directed by the board, and posted in three or four public places, describing the lands through which the portion of the highway proposed to be discontinued passed, as stated in the petition. In addition to the board, there were present at that meeting the plaintiff and George Meyer, both of whom signed the petition, but no one else. At that meeting the board looked over the grounds of the road, and decided unanimously to discontinue the portion of the road according to the petition, and directed the clerk to draw an order to that effect, according to a prescribed form, and thereupon adjourned to December 16, 1901, at the clerk's office. The clerk thereupon drew

such order, and on December 16, 1901, the respective members of the board, to wit, Henry Steckelberg, William Schroeder, and William Kohlmeyer, separately from each other, signed the order, and the same was marked "Filed" by the clerk. The clerk, Fred Jiles, was an invalid at the time, and died two weeks afterwards. Thereupon a new clerk was appointed, and diligent search was made for such order, but no such order was ever found; and the only evidence of the existence and contents of such order is the oral testimony of the three several members of the board, who separately, and in the absence of each other, signed the same. In May, 1901, the plaintiff fenced off the portion of the road so claimed to be discontinued, and notified the defendant, as the overseer of highways, of such discontinuance. May 28, 1901, the defendant removed such fences. Thereupon the plaintiff again fenced up such road, and the defendant again removed the fences June 13, 1902. The removal of such fences by the defendant is the ground upon which the plaintiff seeks to maintain this action. At the close of all the testimony the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans* and *H. H. Thomas.*

For the respondent there was a brief by *Stone & Malone,* and oral argument by *James A. Stone.*

CASSODAY, C. J. 1. It appears, and is undisputed, that for many years prior to December 14, 1901, there was a public highway running east and west on the line between sections 3 and 10 in the town of Westfield, in Sauk county, and that the same continued east indefinitely. It is a portion of that highway which is claimed to have been discontinued. That highway, at the west end thereof, intersected another highway running north and south on the west lines of sections 3

and 10. From the northeast corner of that section 10 there was a highway running south from the highway in question, on the east line of that section. From a point in the highway in question, about forty rods west of the northeast corner of that section 10, there was another highway "running northwest past the residence of George A. Meyer," as mentioned in the petition. The petition was for the discontinuance of "all that portion" of the east and west highway in question lying "east of the residence of *Carl Schroeder* to the intersection" of the "road running northwest past the residence of George A. Meyer." The residence of the plaintiff, *Carl Schroeder,* appears to have been south of the highway in question, and some 180 rods east of the west line of that section 10, and about eighty or ninety rods west of the intersection of the highway in question with the road running northwest past Meyer's residence. In other words, the portion of the road claimed to have been discontinued constituted about one third of the highway in question, between its intersections with the north and south road at the west and the northwest road at the east. The important question is whether it was legally discontinued. The trial court held that it was not legally discontinued, for want of the requisite notices of the meeting of the board December 14, 1901, and for the further reason that the contents of the order of discontinuance were never agreed upon by the board acting as a body, but were written by the clerk, and then signed by each member of the board in the absence of the others. The statute declares:

"Whenever the supervisors shall . . . discontinue any highway, they shall make and sign an order therefor, incorporating therein a description of the highway so . . . discontinued, . . . and such order shall be filed and recorded in the office of the town clerk, who shall note the time of recording the same in the record. Such order, together with the award of damages . . . shall be so filed within ten days after the day fixed by their notice or adjournment for

deciding upon such application; and in case such supervisors shall fail to file such order and award within the ten days aforesaid they shall be deemed to have decided against such application." Sec. 1269, Stats. 1898.

Counsel raise the question whether the contents of the order, as finally written, should not have been agreed upon by the board, acting together, and then signed by them. But for the purposes of this appeal we shall assume that the order was in the proper form, and was agreed upon by all the members of the board, and then signed by them and filed with the clerk. Upon such assumption, it is obvious that, the order being lost and destroyed, its contents could be established by secondary evidence. Being so established, as we assume it was, it is to have the same effect as though it had never been lost or destroyed. Counsel for the plaintiff contend that such order, so established, raised a conclusive presumption that all requisite notices of the meeting of the board had been given. In support of such contention counsel cite *State ex rel. Iola v. Nelson,* 57 Wis. 147, 15 N. W. 14; *Jackson v. Rankin,* 67 Wis. 285, 30 N. W. 301. But neither of those cases refers to the section of the statute which must govern in the case at bar, and which declares:

"The order of the supervisors . . . discontinuing any highway . . . and the record or a certified copy thereof, shall be *presumptive* evidence of the facts therein stated and of the regularity of all the proceedings prior to the making of such order." Sec. 1298, Stats. 1898.

That section has been in force for many years, and the decisions of this court are numerous to the effect that the presumption mentioned in the section may be overcome by evidence. *Roehrborn v. Schmidt,* 16 Wis. 519; *Neis v. Franzen,* 18 Wis. 537; *Williams v. Mitchell,* 49 Wis. 284, 5 N. W. 798; *State v. Logue,* 73 Wis. 598, 41 N. W. 1061; *State ex rel. Jenkins v. Harland,* 74 Wis. 11, 41 N. W. 1060; *Williams v. Giblin,* 86 Wis. 147, 149, 150, 56 N. W. 645.

2. This makes it important to consider what notices of the meeting of the board December 14, 1901, were required by the statutes, and whether the evidence shows that any of such notices were not given. The statute declares:

"On application made to supervisors for laying out, widening, altering or discontinuing any highway they will make out a notice fixing therein a time and place at which they shall meet and decide upon such application. The applicants shall, at least five days previous to such time, cause such notice to be given to all the occupants of the lands through which such highway may pass; and in case such application shall be for the discontinuance of the whole or any portion of the highway such notice shall be given to the occupants of all the lands abutting or touching on such highway the whole or any part of which is sought to be discontinued, which notice shall be served personally or by copy left with or at the usual place of abode of such occupant of such lands, and such notice shall also be posted up in three public places in said town at least ten days before the time of such meeting of the supervisors." Sec. 1267, Stats. 1898.

Just what is meant by the whole highway, a portion of which is thus sought to be discontinued, may not in all cases be easily determined. In the case at bar it certainly includes all of the highway on the line between sections 3 and 10. The occupants of lands abutting upon the portion of such highway not sought to be discontinued were entitled to have notice served upon them personally or by copy just as much as the occupants of lands abutting upon the portion of such highway so sought to be discontinued. It required the whole of such highway to enable public travel to pass from one of such intersecting highways to the other. Here it is in evidence and admitted that the lands of Henry Koenecke abutted upon the west end of that highway, on both sides, for a distance of eighty rods, and that he occupied the same, but that there was no proof made before the town board that the notice of the meeting of December 14, 1901, required by the section of the statute last cited, had been served on him

personally or by copy as therein required. The same is true of Fred Huebing, who owned and occupied the northeast quarter of the northeast quarter of section 9, and which abutted upon the west end of the highway in question. The same is true of the defendant in this action, who owned and occupied the southeast quarter of the southeast quarter of section 4, which also abutted upon the west end of the highway in question. The supervisors were only authorized by the statutes to "proceed to examine personally such highway," and to "hear any reason" that might "be offered for or against . . . discontinuing the same," and "decide against the application upon being satisfied that the notices required in" sec. 1267 of the statute had "been duly given." Sec. 1268, Stats. 1898. The town board, as well as the petitioners, obviously acted upon the theory that the statutes only required such notices to be given to the occupants of lands abutting upon the portion of the highway so proposed to be discontinued. The four owners and occupants of the lands abutting upon the portion of the highway so sought to be discontinued signed the petition for the same, and thereby waived the necessity of such notice, as to them. And yet, even as to such petitioners, this court has held:

"Though the owner of land over which it was attempted to lay out a highway signed the petition therefor and hence was not entitled to notice of the meeting of the supervisors, yet he may avail himself of the want of notice to the public and other owners, to invalidate the proceedings." *State v. Logue,* 73 Wis. 598, 601, 41 N. W. 1061, 1062.

In that case, Mr. Justice TAYLOR, speaking for the court, said:

"The evidence of the defendant also establishes the fact that the notices of the application for laying out the highway, and of the time and place when and where they would meet to consider such application, which are required to be given by sec. 1267, R. S. 1878, were not in fact given. That the failure to give the notice required by said section is fatal to

the proceedings of the supervisors in laying out a highway has been frequently decided by this court." Citing numerous cases. See, also, *Williams v. Giblin,* 86 Wis. 150, 151, 56 N. W. 645.

Manifestly, the failure to serve such notice personally or by copy upon such abutting occupants of lands on such highway, at the west end thereof, was fatal to the proceedings.

3. Besides, one of the sections of the statutes quoted above provides, in effect, that the order discontinuing a highway or any portion thereof, "together with the award of damages" therefor, shall be filed in the office of the town clerk "within ten days after" the decision upon the application, and, in case of failure to so "file such order *and award* within" the ten days, the supervisors "shall be deemed to have decided against such application." Sec. 1269, Stats. 1898. The next section provides that in case such owner fails to agree with the supervisors as to the compensation to be received, or gives a written release of all claims for damages, the "supervisors shall, *at the time* of making such order, assess the damages which such owner shall sustain." Sec. 1270, Stats. 1898. It is enough to say that in the case at bar there is no claim or pretense that any damages were ever assessed or released or waived by any abutting owner—much less, by the three abutting owners at the west end of the highway in question—or that any award of damages was ever filed in the office of the town clerk. We must hold that the order purporting to discontinue a portion of the highway in question was a nullity.

4. After having stipulated before any evidence was introduced that the *locus in quo* was a highway up to the time of the attempted discontinuance, and the trial had proceeded, and testimony taken which covers thirty-eight typewritten pages, including a considerable portion of the defense, counsel for the plaintiff attempted to prove that the defendant, in removing the fence, "went outside of the old highway it-

self, as it formerly existed," and while he admitted "that there was travel over that place, and that a highway had been laid out there," yet he contended "that the highway as traveled was not the highway as laid out." Counsel for the defendant insisted that upon the faith of the stipulation they had prepared their testimony and tried the case, and the trial court thereupon held that such stipulation was binding upon the plaintiff. We have no doubt of the correctness of such ruling. Besides, the mere fact "that the highway as traveled" was "not the highway as laid out" is no ground for claiming that the *locus in quo* was outside of the highway. *Neis v. Franzen,* 18 Wis. 537; *Fitzgerald v. Berlin,* 64 Wis. 203, 24 N. W. 879. We must hold that the nonsuit was properly granted.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER, J., took no part.

KLITZKE, Respondent, vs. WEBB and others, Appellants.

December 14, 1903—January 12, 1904.

Negligence: Personal injuries: **Res ipsa loquitur:** ***Presumptions: Rebuttal.***

1. **In an action for injuries sustained by the falling over of a door, taken from its hinges by defendants' servants and placed on a platform against the building, evidence of plaintiff, in effect, that she was standing on the platform, that she did not touch the door, and that from some unexplained cause it fell upon and injured her, raises a presumption that the door was negligently placed in such a position that it was liable to fall over without assistance.**
2. **Such proof is sufficient, when plaintiff rests, to take the question of defendants' negligence to the jury.**

3. In such case, such presumption is overcome by direct and positive proof that when the door was removed from its hinges and placed on the platform its base was placed against a row of nail heads in the platform eighteen inches distant from and parallel with the building, and that it leaned against the building with its top just under a gas pipe which ran along on the outside of the building.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries. The action was tried before a jury. The evidence showed that in and prior to June, 1902, the defendants were partners operating a grocery store at Reedsburg, Sauk county; that the store faced eastward on Walnut street, and that there was an alley running east and west along the south side thereof; that the main entrance to the store was on Walnut street, and that there was a rear entrance near the west end of the store opening on to the alley, and that along the north side of the alley, and next to the store, was a plank platform six feet in width and about twenty-seven inches in height, extending from Walnut street past the rear door aforesaid; that this platform was used for receiving farmers' produce and delivering goods to wagons, and sometimes for customers to pass in and out at their convenience; that the rear door aforesaid opening upon this platform swings inward, and that on busy days during the summer it was frequently removed from its hinges by the defendants' employees, and placed on the aforesaid platform just outside of and west of the doorway, and leaned up against the building; that the door was a pine door three and one half feet by seven feet in size, weighing sixty-eight pounds, and that the reason of the removal of the door from its hinges was that when open or swinging to and fro it hindered access to the elevator inside of the store; that on June 14, 1902, this door was taken from its hinges by one of the defendants' clerks and placed outside upon the platform leaning against the building at about ten o'clock a. m.,

the day being an ordinary summer day, with no unusual wind; that the plaintiff was a woman about seventy-seven years of age, and that on the last-named day, at about two o'clock p. m., she brought a box of eggs to the store to trade; that the eggs were unloaded in the alley upon the platform, and that she took them into the store through the rear door; that she sold the eggs, and purchased some groceries and other articles, and remained in the store until about five o'clock p. m., when she took the egg box and her umbrella and went out of the rear door and stood upon the platform, waiting for her son to come for her with the team and wagon; that while standing on the platform the door fell over on her, knocking her off from the platform, and inflicting personal injuries, for which this action is brought. The plaintiff denied having touched the door. A special verdict was returned as follows:

"(1) Did the defendants' employees place the door on the platform in such a position that the platform was a reasonably safe place for the plaintiff and other persons to be used by them as customers at defendants' store, as she did on the day in question? *Answer.* No. (2) Did the plaintiff, *Mrs. Klitzke,* take hold of the door with her hand, and thereby contribute to cause the door to tip over and cause the door to fall over on her? *A.* No. (3) If your answer to question number 1 is 'No,' was the injury to the plaintiff the natural and probable result of placing the door in the position in which you find it was on the day in question? *A.* Yes. (4) Ought the defendants, as men of ordinary intelligence and prudence, to have reasonably expected that an injury like the one the plaintiff suffered would probably result from their conduct in having the door placed as it was? *A.* Yes. (5) What sum do you find will compensate the plaintiff for the injuries she sustained? *A.* $400.00."

Upon this verdict judgment for the plaintiff was rendered, and the defendants appeal.

G. Stevens, for the appellants.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans* and *H. H. Thomas.*

WINSLOW, J. In order to show actionable negligence on the part of the defendants, the plaintiff relied solely on the doctrine of *res ipsa loquitur.* She gave evidence to the effect that she was standing on the platform, that she did not touch the door, and that for some unexplained cause it fell upon her. Doubtless this was sufficient evidence, in the first instance, to raise a presumption that the door was negligently placed upon the platform by the defendants' servants in such a position that it was liable to fall over without assistance, because, if securely and properly placed, it would not, in the ordinary course of events, fall over without some intervening or assisting cause. This doctrine has been approved many times in this court, and is not open to question. *Cummings v. National F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176. The proof was sufficient, therefore, when the plaintiff rested her case, to take the question of defendants' negligence to the jury. The defendants, however, met this presumption by direct and positive proof that when the door was removed from its hinges on the morning of the accident and placed outside upon the platform its base was placed against a row of nail heads in the platform eighteen inches distant from and parallel with the building, and that it was leaned up against the building with its top just under a gas pipe which ran along on the outside of the building. This evidence was specific and uncontradicted. It is matter of common knowledge that a door of the size and weight of the door in question, when placed in such a position under ordinary conditions, such as were present here, will not fall out-

wards without assistance. The laws of gravitation forbid. Hence, when this proof came in, and was undisputed, the presumption of negligence from the mere happening of the accident was entirely overthrown, and nothing was left for the consideration of the jury. This principle also has been frequently declared, and is well established. *Spaulding v. C. & N. W. R. Co.* 33 Wis. 582; *Vorbrich v. Geuder & P. Mfg. Co. supra,* and cases cited. It follows that the defendants' motion to set aside the verdict and for a new trial should have been granted.

By the Court.—Judgment reversed, and action remanded for a new trial.

SIEBECKER, J., took no part.

MANDT WAGON COMPANY, Appellant, vs. FULLER & JOHNSON MANUFACTURING COMPANY, Respondent.

December 14, 1903—January 12, 1904.

Contracts: Settlement: Release: Pleading: Demurrer.

In an action on contract for goods sold by plaintiff's assignor, defendant pleaded a settlement and release with the assignor prior to the assignment. The release, pleaded in the answer, after stating the relations between the assignor and defendant, contained a provision releasing defendant "of and from any and all claim or claims of every nature and description arising or growing out of any of the transactions above referred to," and it was alleged that plaintiff's claim was therein included. *Held,* that it was competent to show by extrinsic evidence that plaintiff's claim arose out of the transactions specifically mentioned in the release, and it necessarily followed that the answer stated a defense to plaintiff's cause of action.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Omitting formal allegations the complaint states this: Between January 26, 1896, and April 2, 1902, the T. G. Mandt Vehicle Company sold and delivered to defendant goods, wares and merchandise of the value of $16,654.18. An itemized statement thereof is annexed to the complaint. There has been paid thereon $16,370.33. The balance, $283.85, became due April 2, 1902, and has not been paid. Prior to the commencement of this action it was, for value, assigned to plaintiff. To that was added a proper prayer for judgment.

Defendant answered in substance as follows: T. G. Mandt was the president of the T. G. Mandt Vehicle Company from the time of its organization till the date of his death, February 28, 1902. During such time he invented several improvements in wagons, buggies and bobsleighs, and obtained patents for such inventions, receiving financial assistance in that regard from John A. Johnson, the president of the defendant. In the course of the business transactions in relation to such patents Mr. Johnson became a joint owner with Mandt of some of them, and was such at the time of his death, which was prior to the settlement hereafter referred to. During the period mentioned the said T. G. Mandt Vehicle Company and the defendant traded with each other with reference to the manufacture of articles which included devices covered by such patents. In all such trade relations T. G. Mandt acted on behalf of the T. G. Mandt Vehicle Company. Prior to April 28, 1902, the then president of such company called upon the representative of the heirs of said Johnson, and of the defendant, with reference to settling any difference existing between said heirs and those of said Mandt, and also between the T. G. Mandt Vehicle Company and the defendant, and obtaining from the Johnson heirs all interests held by said Johnson at the time of his death in certain patents used by said vehicle company, and a release of said company from obligations to pay the Johnson heirs

royalties on certain devices manufactured by said company under patents formerly owned by said Johnson and said Mandt jointly, and a release from agreements to pay royalties under said patents, no part of which had been paid. Thereafter, on April 28, 1902, an agreement was entered into between all the parties mentioned, whereby the cause of action mentioned in the complaint was settled and the defendant discharged thereof. Said agreement was made in writing under seal. In substance and effect it was as follows:

Agreement between the heirs of T. G. Mandt and the T. G. Mandt Vehicle Company on the one side, and the heirs of John A. Johnson and the *Fuller & Johnson Manufacturing Company* on the other side.

Whereas T. G. Mandt, during his lifetime obtained certain patents pertaining to vehicles and bobsleds, some of which became the joint property of himself and John A. Johnson, and under which patents the *Fuller & Johnson Manufacturing Company* and John A. Johnson were given certain rights and privileges, for which payments have been made; and

Whereas said Johnson advanced money to the said Mandt to enable him to obtain patents and to carry on business, on account of which a considerable sum is due the heirs at law of said Johnson; and

Whereas said Johnson owned an interest in the following of said patents (description of patents), the letters in respect to some of which have been used by the said vehicle company and no accounting therefor made to the said Johnson or his heirs; and

Whereas the heirs of said Johnson are interested as stockholders in the *Fuller & Johnson Manufacturing Company,* and desire that it be protected in the future use of such of the inventions referred to as it has heretofore used as licensee, to wit, (description of patents); and

Whereas the heirs of T. G. Mandt own stock in the said vehicle company and desire to settle and adjust any claim that might be made against said company or the estate of T. G. Mandt on account of the joint interest in patents as heretofore set forth, and to settle and adjust any claim the heirs of said Johnson have against the estate of T. G. Mandt on account of loans, advances of money, etc., and to obtain from them an assignment to Jorand K. Mandt of certain patents before described, it is agreed between the parties as follows:

"That a full, complete and final settlement is this day and hereby made by and between the parties to this agreement, and that the said parties of the first part are fully released and discharged by the said parties of the second part of and from any and all claims of every name, nature and description which they or either of them have, may have or might have had by reason of any of the transactions hereinbefore mentioned.

"And the said parties of the first part hereby release, and forever discharge the said parties of the second part of and from any and all claim or claims of every nature and description arising or growing out of any of the transactions above referred to."

And the heirs of John A. Johnson, in consideration thereof, hereby sell, assign, transfer and set over to the said Jorand K. Mandt, or her assigns, all the right, title and interest they may at present have in any and all of the letters patent granted by the United States to the said Johnson or assigned to him in whole or in part, and described as follows: (Description of patents),

Reserving, however, a license or shop right to and for the use and benefit of the said *Fuller & Johnson Manufacturing Company,* and its successors in business, in and to the said described patents.

Some other provisions followed, which need not be set forth for the purposes of this appeal. The answer further

contained a general denial of indebtedness and of all allegations of the complaint not specifically admitted.

The plaintiff demurred to the answer for insufficiency. The demurrer was overruled and plaintiff appealed.

For the appellants there was a brief by *Tenneys, Hall & Swansen,* and oral argument by *Sam T. Swansen.*

William R. Bagley, for the respondent.

MARSHALL, J. The sole question raised by the demurrer is: Does it appear by the contract set forth in the answer, and the allegations in respect thereto, that such contract was intended to cover the subject-matter upon which plaintiff's cause of action is grounded? It is alleged in the answer that appellant's assignee, by the contract of settlement, released and discharged such cause of action. Referring to the contract itself, we are unable to find words therein which literally and plainly refer to the subject of such action. There is, however, following a statement of the relations that existed between John A. Johnson and T. G. Mandt, and the latter and the defendant company, as to patents and the purpose of the agreement to settle all such matters, in addition to language to the effect that a settlement was thereby made accordingly, this broad declaration:

"The said parties of the first part hereby release and forever discharge the said parties of the second part of and from any and all claim or claims of every nature and description arising or growing out of any of the transactions above referred to."

It will be thus seen that the answer in effect alleges that the settlement contract covered all matters therein specifically referred to and all arising or growing out of the same, and that the claim in suit was one of them. It is competent to show, by extrinsic evidence, that the plaintiff's claim falls within the terms of the general release; that is, *whether it is a claim arising out of the transactions specifically mentioned*

in the contract. The words of the release are plainly broad enough to include it if it satisfies the test indicated. It follows necessarily that the answer states a defense to the plaintiff's cause of action and that the demurrer was properly overruled.

By the Court.—Order affirmed.

CASSODAY, C. J., and SIEBECKER, J., took no part.

IN RE COWLEY'S WILL.

December 15, 1903—January 12, 1904.

Wills: Construction: "My lawful heirs": Appeal and error.

1. A testator gave his estate to his wife for life, and on her death to his eldest daughter for life, and provided that after her death "such portion of my said estate as may remain shall be equally divided between my lawful heirs." *Held*, that the testator meant by the term "my lawful heirs" those persons who at his death would by law have been entitled to inherit his intestate estate.
2. An appellant is not prejudiced by a judgment which on the theory of the law advanced by him would result in his taking nothing.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The testator, Thomas Cowley, at the date of making the will in question, to wit: June 15, 1868, was a farmer owning and living upon a farm of 120 acres of land, with little personal property. He then had a wife and eight adult children, most, if not all, of whom were married and not resident with the parents, except the eldest daughter, Maria Jobbins, a widow with children, who did reside with and care for them. The will was made in anticipation of his then imminent death, which occurred July 8, 1868. The real estate which

is now the subject of claim by the respective parties to this action constituted nearly all of the estate left by him. The disposing part of the will was as follows:

"After payment of my debts and funeral expenses, I give, devise, and bequeath to wife, Rebecca, all of my lawful estate, both real and personal, and after the death of my wife, Rebecca, the said estate to revert to my eldest daughter, Maria Jobbins, which I bequeath as her home in consideration of her care of her father and mother while they live, and after the death of my wife, Rebecca, I still bequeath the said estate to my said eldest daughter, Maria, her natural life, and after the said Maria's death, my eldest daughter, the such portion of my said estate as may remain, shall be equally divided between my lawful heirs."

An administrator with the will annexed was appointed, and formally discharged. The farm in question has been occupied, first, by the widow and Maria together until the widow's death, and thenceforward by the daughter, Maria, who died August 17, 1900, leaving four living children, and issue of two of her children who had predeceased her after the death of the testator. Another child of the testator, Alfred Cowley, also died after his father and before his sister, leaving him now surviving six children and the issue of a deceased child, who died after the testator and before Maria. The other six children of testator are still living; some, if not all, of them having families of children. After the death of Maria, and about August, 1901, one of the children of testator (*Ellen Hallock*) made petition to the county court for construction of the will, and adjudication of the interests of the parties therein. The county court adjudged that all of the children, grandchildren, and great-grandchildren of the testator living at the death of Maria constituted the reversionary class, to each of whom was awarded an equal share, to wit, one twenty-third. Upon appeal the circuit court found substantially the foregoing facts, and, as a specific fact, that the testator intended to devise the remainder to his children,

and adjudged one eighth of the estate to each of the surviving children, and to the surviving issue of each of the deceased children an eighth part, divided according to the rights of representation. From that judgment certain of the grandchildren and great-grandchildren, whose parents predeceased Maria Jobbins, appeal. No bill of exceptions was settled.

For the appellants there was a brief by *J. H. Rogers,* guardian *ad litem,* and *H. E. Andrews,* attorney, and oral argument by *Mr. Andrews.*

For the respondents there was a brief by *Fowler & McNamara,* and oral argument by *C. A. Fowler.*

DODGE, J. The point of contention in this case is the meaning of "my lawful heirs." The respondents contend, and the trial court found, that the testator meant those persons who at his death were by law entitled to inherit his intestate real estate, to wit, his eight children. The appellants insist that he meant those persons who would by law have been entitled to inherit said realty, had testator died at the time of the termination of the two life estates, or on August 17, 1900, the day of the death of Maria Jobbins. The words themselves are not ambiguous, but have a well-ascertained and definite meaning, entirely in accord with that ascribed to them by the trial court, supported by such dictionaries as Webster's, the Century, and the Standard; also by 1 Bouvier, Law Dic. 941, 942; Anderson's Dic. 508; 2 Blackstone, Com. 201; *Holloway v. Holloway,* 5 Ves. Jr. 399; *Rand v. Butler,* 48 Conn. 293; *McDaniel v. Allen,* 64 Miss. 417, 1 South. 356; *In re Tucker's Will,* 63 Vt. 104, 21 Atl. 272; *Buzby's Appeal,* 61 Pa. St. 111, 114; *Brown v. Lawrence,* 3 Cush. 390, 396; *Childs v. Russell,* 11 Metc. 16; *Abbott v. Bradstreet,* 3 Allen, 587; *Lavery v. Egan,* 143 Mass. 389, 9 N. E. 747. The list of authorities might be extended much further, but it is unnecessary, for they are without substantial conflict, not only as to the primary meaning of the words,

but also as to the meaning they must have in context and under circumstances like the present. They support overwhelmingly the rule that reference in a will to heirs or legal heirs of the testator means the persons who at his death are by law entitled to inherit his realty; that such significance can be overcome only by clear and conclusive evidence of a different intent or meaning; that the enjoyment, or even the vesting, of the devised property is postponed to some future time, or dependent on contingency, is not sufficient; nor the fact that an intermediate life estate is given to one of such heirs, so that his death must precede the falling in of the devised property; nor the fact that the provision of the will is merely to distribute or divide the property at some future time, with no words of gift or grant otherwise. The foregoing grounds for holding that the testator did not intend the words "my legal heirs" to have their accurate and legal meaning, which are substantially all that are insisted upon by the appellants here, have all been so fully met and overruled in the foregoing cases that we hardly feel justified in more than the citation. Perhaps the most strenuous of appellants' contentions is that because the will contains no words of present gift, but merely a direction to divide the property after the death of the life tenant, therefore the actual recipients of shares of the property could not be known till that time; hence, as a result, the testator must have intended the gift in remainder to a class to be then ascertained. If we concede such force as is claimed for the mere direction to divide—a proposition which we need not decide—the conclusion does not necessarily result. In the recent cases of *In re Albiston's Est.* 117 Wis. 272, 94 N. W. 169, and *In re Moran's Will,* 118 Wis. 177, 96 N. W. 367, such a provision, supplemented by other clear evidence of intent, was held to show a purpose that only persons in being at the expiration of the intermediate estate should in fact receive anything; but, especially in the latter case, this was held not inconsistent with the

designation of a class as of the testator's death, from which must come the actual recipients, nor inconsistent with such a vesting of title in the class existing at the time of testator's death and at every moment thereafter as would satisfy the requirements of our statutes against perpetuities. So, here, if the will were construed a grant only to such of testator's heirs as might be alive at the death of Maria Jobbins, that would in no wise militate against the conclusion that his heirs must be those who were such at his death; that a class then designated became vested with the title in remainder, although the right of any individual member of that class might be contingent, in the sense of being liable to be devested by his death before Maria. The surrounding circumstances, we think, tend to confirm the inference of testator's purpose resulting from the accurate meaning of the words used. The will was made when testator believed his death imminent, so that the descendants who would survive him would be the eight children then living. No reason is disclosed why he should favor one child rather than another, except as to Maria, to whom he provided a home on the farm during her life. The several children themselves had families of children, differing in number. It is extremely improbable that the testator contemplated that the equal share naturally attributable to each child should be subject to diminution by the death of any other of his children, leaving numerous issue. Equality between those whom the testator then knew to be his legal heirs is so natural a motive, under the circumstances, that strong evidence would be necessary to preclude inference of existence. We therefore reach agreement with the conclusion of the trial court as to the meaning of "my legal heirs" as an original proposition, without resting upon conclusiveness of the finding to that effect which would result from absence of any bill of exceptions presenting all the evidence, if, as apparently the case, that finding rested on extrinsic evidence supporting the inference drawn. *Ganson*

v. Madigan, 15 Wis. 144; *Vilas v. Bundy,* 106 Wis. 168, 176, 81 N. W. 812; *Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co.* 113 Wis 161, 170, 87 N. W. 1085, 89 N. W. 180; *Merrill v. Best,* 116 Wis. 121, 92 N. W. 555.

Another question, suggested probably by the *Moran Case,* has been mentioned, though hardly discussed, upon the argument in this court. It does not appear to have been raised at all in the circuit court. That question is, conceding the expression "legal heirs" to include only those living at testator's death, namely, his eight children, whether the intention was to give to them absolutely and as individuals, so that the interest of each became vested, in the common-law sense, or only to such members of that class as survived the period fixed for distribution and enjoyment. In the first view of testator's intention, the issue of any deceased child would take as heirs of that child by representation. *Scott v. West,* 63 Wis. 529, 569, 24 N. W. 161, 25 N. W. 18; *Patton v. Ludington,* 103 Wis. 629, 647, 79 N. W. 1073; *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452. In the latter they would not take at all. *In re Albiston's Est.* 117 Wis. 272, 94 N. W. 169; *In re Moran's Will,* 118 Wis. 177, 96 N. W. 367. The judgment appealed from proceeds upon the former view. Under it, each of the appellants takes something, while, if the latter view of testator's purpose were adopted, they would none of them take anything. Therefore, if the judgment were held erroneous in this respect, it could in no wise prejudice or injure these appellants, but would merely unduly favor them. Since those prejudicially affected rest content, and do not appeal, we could not reverse the judgment for such an error. Sec. 2829, Stats. 1898; *Decker v. Trilling,* 24 Wis. 610, 615; *Ackley v. Vilas,* 79 Wis. 157, 48 N. W. 257; *Keystone L. Co. v. Kolman,* 103 Wis. 300, 303, 79 N. W. 224.

By the Court.—Judgment affirmed.

SIEBECKER, J., took no part.

CASSODAY, C. J. I concur in affirming the judgment of the trial court in this case, but not in all that is said in the opinion of my Brother DODGE. The language of the will is very plain and simple. Upon the death of the testator, and by the express terms of the will and the well-established rules of construction, as I read the authorities, the estate became vested in the testator's "lawful heirs"—being his eight children who then survived him—subject only to the two intervening life estates therein mentioned. This being so, on the death of any one of such children his share of such estate necessarily descended to his heirs at law. Secs. 2270, 2289, Stats. 1898. That such is the well-recognized rule of law, I refer to the following as a few of the many cases that might be cited: *Moore v. Lyons,* 25 Wend. 119; *Livingston v. Greene,* 52 N. Y. 118, 123; *Kelly v. Kelly,* 61 N. Y. 47; *Van Axte v. Fisher,* 117 N. Y. 401, 22 N. E. 943; *Nelson v. Russell,* 135 N. Y. 137, 140, 31 N. E. 1008; *Stokes v. Weston,* 142 N. Y. 433, 37 N. E. 515; *Hersee v. Simpson,* 154 N. Y. 496, 48 N. E. 890; *Baker v. McLeod's Estate,* 79 Wis. 534, 541–545, 48 N. W. 657; *Burnham v. Burnham,* 79 Wis. 557, 566, 567, 48 N. W. 661. These cases and many others are cited and sufficiently commented upon in my opinion in the *Moran Will Case,* 118 Wis. 177, 96 N. W. 375–377.

On February 23, 1904, the mandate of the court was amended to the extent of allowing the taxable costs of both parties to be paid out of the estate.

GALL, Appellant, vs. GALL, Respondent.

December 15, 1903—January 12, 1904.

Appeal and error: Bill of exceptions: Certificate of trial judge: Impeachment: Presumptions: Contracts: Consideration: Demand: Commencement of action: Pleading: Amendment: Settlement: Refusal to submit question to jury.

1. The recitals in the certificate of the trial judge that the annexed bill of exceptions contains all the evidence, being in conflict with the facts appearing on the face of the bill, such recital, as to all questions depending on such facts, must be regarded as untrue.
2. A bill of exceptions showed on its face that a certain contract, in writing, between the parties was offered in evidence, but the contract itself was not contained in the bill. *Held*, that it must be presumed, in support of the judgment, that the contract so received in evidence showed a consideration for all the promises on the part of the defendant therein contained.
3. The rule that, where payment is to be made by the delivery of specific articles, there is no obligation to pay in money until there is a demand and refusal to deliver the articles, has no application to a contract requiring a defendant to pay to plaintiff $20 in cash *annually*.
4. A complaint alleging an agreement in writing to pay to the plaintiff $20 every year, the breach of it, and the amount due and unpaid by virtue of the agreement and breach, is sufficient to satisfy the statutory rules of pleading without amendment.
5. It is not error to refuse to submit to the jury the question of a settlement, where no settlement was pleaded, and the evidence bearing upon that question was pertinent to the issues raised by the pleadings.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This action was commenced before a justice of the peace December 3, 1901, by *Rosina Gall* against her son, *Charles*, to recover $52.50 in money and the value of certain articles which by the terms of a written agreement, executed by them November 28, 1893, he agreed to pay and deliver to her annually, but which he had failed and neglected to do, to the

amount of $142.50, and that that sum included $30 for a cow belonging to the plaintiff, and was sold by the defendant for $30 and the proceeds thereof retained by him. The defendant answered by way of admissions, denials, and counter allegations, pleading the statutes of limitation as to the cow, and payment under the written contract as to the other items. After the case was taken on appeal to the circuit court it came on for trial, and after the court overruled a demurrer *ore tenus* to the complaint the case was tried. At the close of the testimony the defendant moved the court to direct a verdict in favor of the defendant, on the ground, among others, that no demand had been alleged in the complaint or proven on the trial, and that the plaintiff had failed to show title to the cow. The court refused such motion, and held that no demand had been alleged in the complaint, and that there was no evidence of any demand except as to the money, and as to that the court allowed the complaint to be amended by alleging such demand. Thereupon, and after charging the jury, they returned a special verdict to the effect (1) that there was money due from the defendant to the plaintiff December 3, 1901, under that provision of the contract in question requiring the defendant to pay the plaintiff $20 in cash yearly; (2) that there was a demand made for and by the plaintiff for the payment of that money before December 3, 1901; (3) that they found that there was due to the plaintiff at that time $37.50; (4) that the defendant did not sell the cow which was owned by the plaintiff for the sum of $30, as charged in the complaint. From the judgment entered upon such verdict in favor of the plaintiff, the defendant, *Charles Gall,* brings this appeal.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans* and *H. H. Thomas.*

For the respondent there was a brief by *Stone & Malone,* and oral argument by *James A. Stone.*

CASSODAY, C. J. Before the case was submitted to the jury, the trial court held, as a matter of law, that for want of sufficient demand the plaintiff could recover nothing on any of her several claims for pork, beef, or wood, amounting in the aggregate to $60. The jury found that the defendant did not sell the plaintiff's cow and keep the proceeds of $30, as claimed by the plaintiff. Since the plaintiff has not appealed from the judgment, such finding of the jury and such ruling of the court eliminate from the case all of the plaintiff's claims, except as to her claim for money due under the contract. As to that claim, the complaint alleges, in effect, that the defendant agreed in and by the written agreement executed November 28, 1893, to pay to the plaintiff annually $20 in cash, and that he had failed and neglected to pay said sum of $20 annually as agreed, and that there was then due and unpaid to the plaintiff by virtue of said agreement the sum of $52.50. The answer pleaded payment. The jury found that there was due the plaintiff, on such agreement to pay her $20 in cash yearly, $37.50. The only questions here for consideration are such as were determined adversely to the defendant.

1. The defendant contends that a verdict should have been directed in his favor on the ground that the complaint fails to allege a consideration for the agreements on the part of the defendant. As indicated, it does allege the agreement in writing between the parties and executed by the defendant. That agreement was received in evidence without objection, but is not printed and is not contained in the bill of exceptions, which is certified to contain all the evidence. Such recital in the certificate of the trial judge, being in conflict with the facts appearing on the face of the bill of exceptions, must, as to all questions depending on such facts, be regarded as untrue. *Dorer v. Hood,* 113 Wis. 607, 88 N. W. 1009. We must, in support of the judgment, therefore, assume that the written contract so received in evidence did show a con-

sideration for all the promises on the part of the defendant therein contained. Besides, just after the contract was received in evidence, the defendant testified to the effect that he was thirty-eight years of age, and that ever "since November 28, 1893, when the contract was made," he had lived "upon the farm deeded to him by my [his] mother." The plaintiff testified that at the time the defendant came there on the farm, in 1893, she signed a contract "giving everything." Undoubtedly such deed and contract so mentioned by the defendant were made at the same time and as a part of the same transaction.

2. Counsel cite a number of adjudications to the effect that, where payment is to be made by the delivery of specific articles, there is no obligation to pay in money until there has been a demand and refusal to deliver the articles, and that such demand and refusal should be alleged and proved. That rule was applied by the trial court so far as the agreement required the defendant to make payments to the plaintiff by the delivery of specific articles of property. But that rule has no application to that part of the agreement which required the defendant to pay to the plaintiff $20 in cash *annually*. This made it due without demand. The authorities go further and state:

"As a general proposition, when a specific sum of money is made payable by the agreement of the parties, whether at a specified time and place, or generally, without time or terms specified, as against the original debtor, no demand prior to the commencement of a suit is necessary, but the debtor must seek out the creditor and make a tender to him, if he is within the realms of the state." 9 Am. & Eng. Ency. of Law (2d ed.) 199.

The complaint here alleges an agreement in writing to pay to the plaintiff $20 every year, the breach of it, and the amount due and unpaid by virtue of the agreement and the breach. This seems to be sufficient to satisfy the statute,

without any amendment. Secs. 2646, 2668, 2675, Stats. 1898.

3. We perceive no error in refusing to submit to the jury the question whether there was a settlement between the parties November 21, 1901, except as to the pork. No such settlement nor any settlement was pleaded, and the evidence bearing upon the question was pertinent to the issues in the case. The appeal seems to be without merit.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER, J., took no part.

JONES, Appellant, vs. THOMAS, Respondent.

December 15, 1903—January 12, 1904.

Arbitration and award: Subject matter submitted: Construction: Equity: Inequitable use of judgments: Injunction.

1. An agreement between a judgment debtor and his creditor—the subject-matter of the judgment being in dispute—submitting without qualification the real right of the matter to arbitrators for decision, includes by necessary implication an agreement to discharge such judgment; and a court of equity, in the absence of some countervailing equity of the creditor, will, at the suit of the debtor, enjoin the inequitable use of such judgment and compel its discharge.
2. An agreement to submit the subject of the validity of a judgment to arbitrators to determine, such validity being in litigation, nothing appearing to the contrary, implies that such submission shall displace such litigation and that the judgment shall stand or fall as a result of the award.
3. An agreement for arbitration of the character above suggested, including other matters of difference of a pecuniary nature, the right of the matter as to such other matters to be considered with the judgment indebtedness in determining what amount, if anything, shall be paid by either party to the other,

implies that the judgment shall abide the result of the arbitration.

4. An agreement of the character above mentioned, including, after describing the matters submitted, an agreement, in effect, that each party shall abide by the commands of the arbitrators, followed by language to the effect that all actions, suits or proceedings now pending shall be withdrawn and dismissed and all judgments or liens of either against the other shall be discharged, does not indicate beyond reasonable controversy a mutual intention that the discharge shall occur regardless of the award, and that the remedy of either party to collect any sum found due him shall be upon the award alone.
5. A construction put upon an ambiguous arbitration agreement by the parties thereto and by the arbitrators, up to and inclusive of the time of the making of the award, which is reasonable and equitable, may properly be held to be the one intended to be incorporated therein.
6. A controversy as to the amount that ought to be paid upon a judgment having been submitted to arbitrators and determined, equity jurisdiction cannot properly be used to prevent the enforcement of such judgment by ordinary means to the amount of the award upon the judgment debtor refusing to comply therewith.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The complaint is to this effect: April 3, 1902, matters of difference existed between plaintiff and defendant as follows: The latter was a judgment creditor of the former to the amount of $90.65, and $15.75 costs, the judgment having been rendered in justice court and duly transcripted to the circuit court for Columbia county, Wisconsin. There were pending in the latter court proceedings at the suit of the plaintiff, to test the validity of such judgment. There was an action pending between plaintiff and defendant's wife in respect to a matter proper for judicial settlement. For the purpose of adjusting such differences and others, the parties concerned joined in a written submission of the whole to arbitrators to say what was the duty of each in the premises.

The power of the arbitrators, and the words of the agreement in the submission, are as follows:

"Said persons are hereby named and constitute a board of arbitration to hear, try and determine all matters in controversy between the parties hereto that shall be submitted to them, whether actually litigated or otherwise, and their decision thereon shall be final and irrevocable and so recognized and understood by the several parties hereto."

At a time and place designated by said board of arbitration said parties shall present their respective claims, and after due hearing had and a decision and award made by the said board its decision shall be fully and completely carried out by the parties charged thereby with the performance of any duty, whether it be for the payment of money, performing act, or otherwise.

All actions, suits or proceedings now pending shall be withdrawn and dismissed.

All judgments or liens of one or more of the parties against either or any of the other parties hereto shall be satisfied of record.

A bill of costs in the different suits, actions or proceedings shall be made and submitted to said board of arbitration by the attorneys of the respective parties, and the question of what part thereof each party shall pay shall be determined by said board in like manner and effect.

A full hearing before such arbitrators was had and they duly made their award in respect thereto. Plaintiff fully performed his obligations as to the agreement aforesaid, but defendant has failed in that regard and has refused to satisfy of record the said judgment, and has caused an execution to be issued thereon and property of the plaintiff seized thereunder.

Plaintiff asked for relief restraining the defendant and his agents from further proceeding to collect the judgment, and requiring a return of the property seized as aforesaid, and the discharge of such judgment.

The answer is to this effect: The allegations of the complaint are true except those in respect to plaintiff having

fully performed under the arbitration agreement and defendant having failed to do so. The award of the arbitrators, among other things, required plaintiff to pay the sum of $73.68 and one half of the costs to defendant upon the judgment referred to in the complaint, defendant thereupon to discharge the same. Plaintiff has refused to abide by said award in that he has not paid any part of said judgment. The defendant has at all times stood ready and is now ready and willing to abide by the arbitrators' award in every respect.

Plaintiff demurred to the answer for insufficiency and the demurrer was overruled. Plaintiff appealed.

Paul D. Durant, for the appellant.

Daniel H. Grady, for the respondent.

MARSHALL, J. The questions presented by appellant's counsel for consideration, with supporting authorities, come down to this proposition: Did the parties to the arbitration agreement stipulate therein that the judgment against appellant should be discharged regardless of the decision of the arbitrators, the indebtedness evidenced thereby to be submitted to them and so far as valid to be merged into the award? Counsel for appellant contends for the affirmative. If that view be right and appellant's conduct in respect to the award has not so soiled his hands as to preclude his appealing with favor to a court of conscience, the complaint states a good cause of action to prevent the inequitable use of a judgment, under the doctrine of *Johnson v. Huber,* 106 Wis. 282, 284, 82 N. W. 137, and similar cases, and the answer does not state a good defense thereto.

That the submission of the subject-matter of a pending suit, or one that has ripened into a judgment which is still the subject of contest upon appeal or otherwise, to arbitrators to determine what should justly be rendered to the judgment creditor on account thereof, nothing appearing in the

submission to the contrary, *ipso facto* displaces such pending litigation or judgment, is elementary. That result is not effected by mere operation of law upon the fact of submission, but by the terms of the agreement itself. That is to say, such an agreement is supposed to include a stipulation that it shall have that effect. *Dolph v. Clemens,* 4 Wis. 181, 185; *Sohns v. Sloteman,* 85 Wis. 113, 116, 55 N. W. 158; *Bigelow v. Goss,* 5 Wis. 421, 423; *Grosvenor v. Hunt,* 11 How. Pr. 355; *Van Slyke v. Lettice,* 6 Hill, 610; Boyce, Ref. & Arb. 289. It will be observed by an examination of those authorities that whether in a case like the one before us the submission to arbitrators works a discharge of the judgment or constitutes an enforceable agreement to discharge it, depends upon the terms of the agreement. Where the subject-matter of the suit closed by a judgment is subsequently submitted to arbitrators and nothing is said in the agreement to the contrary, it is, as before indicated, presumed that a complete displacement of the judgment was intended, the understanding being that the award shall take its place; but where the agreement clearly shows that legal proceedings are only to be stayed pending the arbitration, or that the judgment already rendered shall abide the decision of the arbitrators, it is to be given that effect only. *Sohns v. Sloteman, supra;* Boyce, Ref. & Arb. 155. In *Grosvenor v. Hunt, supra,* the subject-matter of an action which had ripened into judgment from which an appeal had been taken, was submitted generally to arbitrators, nothing being said about the effect thereof upon the judgment or appeal. The agreement was construed to contain a stipulation for a dismissal of the appeal and a discharge of the judgment. In *Miller v. Van Anken,* 1 Wend. 516, in a situation such as last described, the subject-matter of the litigation was submitted to arbitrators with an express agreement for a dismissal of the appeal, and it was held that the judgment remained in force subject to the action of the arbitrators. In *Van Slyke v. Lettice, supra,* in a similar situ-

ation, the agreement to arbitrate contained a stipulation that "all further proceedings in the suit are hereby stayed and ended," and it was held that the parties intended that the judgment creditor should look solely to the award of the arbitrators for relief.

It is a significant feature of the agreement before us that the subject-matter closed by the judgment was not expressly, and perhaps not at all, submitted to the arbitrators. The indications are that the rights of the parties, independently of errors going to the validity of the judgment, were not in controversy, and that such validity, not the subject-matter upon which the judgment was based, was the matter in dispute. That is, that the subject-matter of the proceedings challenging the legality of the judgment, not the subject-matter of the respondent's claim closed by the judgment, was submitted to the arbitrators. In that view it seems quite clear that the parties agreed that the judgment itself should abide the decision of the arbitrators as to its validity, and should be discharged upon performance by the judgment debtor of the commands of the arbitrators as to him. The agreement will reasonably bear that construction. Not only does it show that the validity only of the judgment was submitted to the arbitrators, but the clause of the agreement in respect to a discharge thereof follows the clause providing for performance by the appellant of the award of the arbitrators, as if performance were to precede the discharge. That is in perfect harmony with the idea that the validity, as distinguished from the subject-matter, of the judgment, was submitted to the arbitrators. That the parties themselves so treated the agreement is evidenced by the fact that they joined in fully presenting their matters of difference to the arbitrators, leaving the judgment undisturbed. That the arbitrators so treated the agreement is evidenced by the fact that they in effect held that the judgment was valid and provided that it should be discharged upon appellant's paying respondent a

sum of money named by them. In short, the contract fairly admits of a construction that the judgment should abide the award of the arbitrators. It was apparently so construed by the parties themselves and by their chosen triers. That practical construction, under familiar rules, may well be deemed sufficient to incline the court to the same view, since it is perfectly reasonable and equitable. The construction to be put upon an ambiguous contract may properly be and is often ruled by the meaning the parties thereto, in the execution thereof, attributed to the same. *Sigerson v. Cushing,* 14 Wis. 527; *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1. It is rightly said that "such rule is founded upon manifestly just principles." *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 430, 52 N. W. 764; *Hosmer v. McDonald,* 80 Wis. 54, 49 N. W. 112; *District of Columbia v. Gallaher,* 124 U. S. 505, 8 Sup. Ct. 585; *Topliff v. Topliff,* 122 U. S. 121, 7 Sup. Ct. 1057.

Our conclusion is that the parties to the arbitration contract agreed therein that the judgment against appellant should abide the decision of the arbitrators and be discharged upon his paying thereon the amount ordered by them. That being the case, manifestly appellant has no standing in a court of equity to enjoin the enforcement of the judgment, so long as he is in default in regard to carrying out the award made against him. Equitably, at least, the judgment should stand as security for the amount of the award, and be enforcible to that extent.

By the Court.—The order is affirmed.

SIEBECKER, J., took no part.

CHICAGO TITLE & TRUST COMPANY, Trustee, and another, Respondents, vs. BASHFORD and others, imp., Appellants.

December 15, 1903—January 12, 1904.

Constitutional law: Foreign corporations: Right to exercise franchises: Citizenship: Interstate comity: Construction of statutes: Vested rights: Failure to comply with statute: Transacting business: Transfer of title by operation of law: Commencement of action: Judgment creditors: Right of possession.

1. While a corporation is not a citizen either of any state or of the United States within the provision of sec. 2, art. IV., Const. U. S., or the XIVth amendment thereto, protecting such citizens against the denial of certain rights by any state, and has no right, by constitutional provision or otherwise, to exercise its corporate franchises in other than its parent jurisdiction, it is the policy of this state to accord to foreign corporations, by comity, full and complete privilege to exercise their corporate franchises within the state, except so far as limitation is imposed by express legislation.
2. Sec. 1770*b*, Stats. 1898 (providing that while in default in the performance of certain requirements, foreign corporations shall not transact business or acquire, hold, or dispose of property in this state, and that every contract made by or in behalf of such a corporation, while so in default, affecting its personal liability, or relating to property within this state, shall be wholly void on its behalf, but shall be enforceable against it), is prospective only, and does not divest corporations which fail to comply with its terms of title to or lien on property which they, by permission of the state, had acquired prior to its enactment.
3. Neither the mere passive continuance, by a foreign corporation, to hold a valid lien on or title to property in this state, acquired prior to the enactment of sec. 1770*b*, Stats. 1898, nor the commencement and prosecution of an action to foreclose such a lien, is "transacting business" within the meaning of that section and neither is prohibited thereby.
4. Neither creditors of a mortgagor, who have subsequently obtained a judgment lien against the mortgaged property, nor purchasers at an execution sale to enforce such a lien, have any present right to the possession of such property, and they are in no position, in an action by the mortgagee, a foreign corporation, to foreclose its lien, to raise objection that because the

corporation had failed to comply with sec. 1770b, Stats. 1898, it could not lawfully transact business in this state, and therefore had no right to take possession of the property under its mortgage giving such right.

5. The mere transfer of the title to property in this state from one foreign corporation to another, resulting by operation of law from the consolidation of two foreign corporations, is not rendered void by failure of the corporation to comply with sec. 1770b, Stats. 1898, although such consolidation took place after the statute went into effect.

APPEAL from an order of the circuit court for Marquette county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

By the complaint it appears that in 1888 and 1894 the defendant Ne-pee-nauk Club, an Illinois corporation, executed two trust deeds on lands in Green Lake and Marquette counties to the Title, Guaranty & Trust Company, also an Illinois corporation, in Illinois, to secure certain bonds, of which $8,700 were issued and by assignment had come to be owned at time of suit, $7,200 by plaintiff *Conley,* and the balance by three other individuals joined as defendants; that those trust deeds were in substantially the customary form to secure such indebtedness, and empowered the trustees to take steps by foreclosure, etc., in case of default, also to enter and take possession and receive rents and profits; that on September 10, 1901, the Title, Guaranty & Trust Company and another corporation (the Chicago Title & Trust Co.) were duly consolidated, pursuant to the law of Illinois, under the name of *"Chicago Title & Trust Company,"* whereby the consolidated company, the plaintiff, succeeded to all the rights, powers, privileges, and properties of the trustee named in said trust deeds. There was allegation of default and exercise of election to declare the whole principal due, and that after such default the plaintiff company, as trustee, had entered and taken possession of the premises and was at the time of the commencement of the suit in possession. The prayer was for foreclosure and sale, and for personal judg-

ment against the defendant Ne-pee-nauk Club for deficiency.

Defendants *Bashford, O'Connor,* and *Aylward* interposed an answer admitting substantially all the material allegations of the complaint, but alleging that they, on the 28th of October, 1902, by attachment followed by judgment on December 22, 1902, acquired a lien upon the lands of the Ne-pee-nauk Club, described in the complaint, which they allege is prior and superior to the lien of the trust deeds, but do not allege in the defensive part of the answer that either the plaintiff trust company or the defendant club have failed to comply with sec. 1770*b*, Stats. 1898, requiring the filing with the secretary of state of Wisconsin of their articles of incorporation, etc.; but, admitting the due and legal consolidation of the Title, Guaranty & Trust Company and the Chicago Title & Trust Co. in September, 1901, and succession of the consolidated company to all the rights of its predecessors, they deny that the plaintiff trust company, as trustee or otherwise, succeeded to any title, right, or interest in the real estate described in the complaint. As a counterclaim, however, they set up substantially the same facts with reference to acquisition of judgments, and that neither the Ne-pee-nauk Club of Chicago, nor the plaintiff trust company, has in any wise complied with such section of the Wisconsin statutes, and they are therefore not entitled to do business or hold property in the state of Wisconsin, and that the plaintiff trust company has acquired no right or interest in any of the lands described, and pray that the lien of their judgments may be declared prior to the trust deeds described in the complaint, and that said deeds be set aside and held for naught.

Plaintiffs demurred to the answer as not stating facts sufficient to constitute a defense, and to the counterclaim for insufficiency of facts, and because the cause of action therein stated is not pleadable as a counterclaim to the action.

The demurrer was sustained by order of the circuit court, from which the said answering defendants bring this appeal.

For the appellants there was a brief by *Bashford, Aylward & Spensley,* and oral argument by *R. M. Bashford.*

W. S. Stroud, for the respondents.

DODGE, J. In order to correctly construe secs. 1770*a*–1770*e*, Stats. 1898, as amended by ch. 399, Laws of 1901, placing burdens upon the exercise by foreign corporations of their corporate franchises in this state, we must proceed in the light of two well-established fundamental doctrines or principles: First, that neither by constitutional provision nor otherwise has a foreign corporation the right to exercise such franchises in other than its parent jurisdiction, and that it is not a citizen either of any state or of the United States, within the provision of either sec. 2, art. IV, of the Constitution of the United States, or sec. 1 of the XIVth amendment to that constitution, protecting such citizens against the denial of certain rights by any state. *Paul v. Virginia,* 8 Wall. 168; *Waters-Pierce O. Co. v. Texas,* 177 U. S. 28, 20 Sup. Ct. 518; *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 78, 89 N. W. 904. Secondly, however, that it is the policy of this state, settled from its earliest existence, to accord to foreign corporations, by comity, full and complete privilege to exercise their corporate franchises within this state except so far as limitation is imposed by express legislation. *Charter Oak L. Ins. Co. v. Sawyer,* 44 Wis. 387; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554, 559, 67 N. W. 932.

The first general scheme of regulation and restraint of all foreign corporations was sec. 1770*b*, Stats. 1898, denouncing certain disabilities upon them while in default in performance of certain trifling requirements, quite analogous to those imposed on domestic corporations. The only provisions of that section which can be deemed in any wise effective to support these defendants in their resistance to the attempt of the plaintiff corporation to maintain the present suit are these: That while in default it shall not "transact business

or acquire, hold, or dispose of property in this state," and that every contract made by it, or on its behalf, affecting its personal liability, or relating to property within this state, shall be wholly void on its behalf, but shall be enforceable against it.

We can feel no doubt that the legislation of 1897 [1] was prospective only. That is the presumptive purpose in all enactments, except some merely remedial statutes, unless the contrary clearly appears. *State v. Atwood,* 11 Wis. 422; *Seamans v. Carter,* 15 Wis. 548; *Finney v. Ackerman,* 21 Wis. 268; *Vanderpool v. L. C. & M. R. Co.* 44 Wis. 652, 663; *Jochem v. Dutcher,* 104 Wis. 611, 614, 80 N. W. 949. Especially strong is that presumption in the present case, when the avoiding of an existing contract or the divesting of a vested right of property would be so clearly obnoxious to the constitutional prohibition against the impairment of the obligation of contracts (sec. 12, art. I, Const. Wis.; sec. 10, art. I, Const. U. S.), and against the deprivation of any person of property without due process of law (art. XIV, Amendment Const. U. S.). What, then, of the plaintiff corporation's conduct since 1898 comes within these statutory provisions? Very plainly, the plaintiff is not now transacting any business in this state, by passively continuing to hold a previously existing and valid lien or title. Such passivity is the negation of transaction of business. Neither is the mere commencement and prosecution of this suit transacting business in the forbidden sense. *Charter Oak L. Ins. Co. v. Sawyer, supra.* See, also, collection of authorities in note to *Cone E. & C. Co. v. Poole,* 41 S. C. 70, 24 L. R. A. 289. Those, however, are the only acts suggested as possible violations of this prohibition of the statute, except, perhaps, the taking possession of the mortgaged land, of which,

[1] The provisions of sec. 1770*b* herein considered were first enacted in 1897 as part of the Statutes of 1898, and, under sec. 4978, did not go into effect until September 1, 1898.—REP.

however, appellants have no interest to complain, for they, as judgment creditors, or even as purchasers at execution sale, have no present right to possession.

It seems equally plain that no contract relied on as support of plaintiffs' cause of action is obnoxious to this statute, construed as prospective. The only contracts relied on were the bonds and trust deeds, all made long prior to the legislation, and entirely valid when made. Such existing valid contracts were not avoided by the statute. In this connection, however, it is suggested that, while the original trust deeds may have been valid, the right of the plaintiffs thereunder arises by virtue of a contract of assignment made in 1901, after the enactment of sec. 1770*b*, Stats. 1898. The making of any such contract is, however, negatived by the allegations of the complaint, admitted by the answer, that the present plaintiff is the mere successor, under the law of Illinois, of all rights of the original trustee; such succession resulting by force of law from the consolidation of two Illinois corporations. For the purposes of this question, no contract of assignment intervenes any more than if the corporate name of the original trustee had been legally changed, or new stockholders admitted. This conclusion that no contract upon which this action is based is void renders immaterial the extended argument of appellants that a foreign corporation cannot maintain a suit in our courts upon a contract rendered void by such a statute as sec. 1770*b*. That argument goes no further than our own decision in *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904.

So there remains of the acts prohibited by sec. 1770*b* only the holding of property in this state, if, indeed, the trustee holds property, instead of a mere lien thereon, having *situs*, not in Wisconsin, but at the domicile of the holder. *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 316, 41 N. W. 521. From what has been said already, our conclusion must be obvious that the statute was not intended to apply to the acquisition of

any property prior to its enactment, nor to the holding of any so acquired, so long as the prohibition against transacting business in this state be not breached. That one, even a foreign corporation, owning property the day before the enactment of sec. 1770*b*, ceased to own or hold it upon the enactment of that statute, is a result which no legislature had any right to intend, nor have courts any right to impute such an intent. The absurdity of such a construction is emphasized by the accompanying prohibition against disposing of any such property. If the legislature intended to forbid the holding of previously acquired property, they equally forbade its disposal. Hence no foreign corporation owning property in this state when sec. 1770*b* took effect could escape criminality save upon the theory that the statute, *ex proprio vigore,* confiscated the property, so that its former owner had ceased to be such without having disposed of it. Clearly such confiscation would be obnoxious to the fourteenth amendment to the federal constitution, forbidding any state to deprive any person of property without due process of law. The only reasonable construction of this portion of the statute is that the prohibitions against holding or disposing of property must be taken as associated with that against acquiring any, so that they apply only to property attempted to be acquired after the statute, and therefore in its defiance. The question how far full enjoyment of previously acquired property so continued to be held by a foreign corporation may be affected by restraint on the doing of business or the making of contracts does not arise in the present case, since none of those prohibited acts appear to have been attempted by plaintiffs. The consideration of that question may properly wait till it arises.

We now hold that the valid title or lien which this corporate plaintiff, by permission of the state, acquired, is not divested or impaired by the subsequent legislation; that the mere bringing of this suit is not a prohibited transacting of

business; hence, as conclusion, that the answer sets up neither any defense to this action, nor any invalidity of plaintiffs' lien to warrant its cancellation, or the clearing of title in appellants' favor. Having reached this conclusion, it becomes unnecessary to consider the further question, somewhat debated, whether *Conley,* a bondholder, might not maintain this action if the trust company were incapacitated to sue, or had been divested of the lien held by it merely in trust for the bondholders.

By the Court.—Order sustaining demurrer is affirmed.

SIEBECKER, J., took no part.

STEIN and another, Appellants, vs. MCCARTHY, Respondent.

December 15, 1903—January 12, 1904.

Building contracts: Evidence: Intention of parties: Reference to specifications.

Defendant took a contract to do the entire work of erecting a building according to plans and specifications and the satisfaction of designated architects. Plaintiffs had examined the plans and specifications and submitted to the owner a bid for the plastering at the same time defendant's bid was accepted. Thereafter defendant handed the plans and specifications to plaintiffs and requested a bid, which was given and rejected on account of the proposed price. Thereafter plaintiffs had an interview with defendant's agent which resulted in an agreement as to price, plaintiffs stating that their bid was "for the job" and such agent then stated, "Go ahead and do the work." *Held,* that plaintiffs were bound to do the work to the satisfaction of the superintendent designated in the specifications, and were only entitled to payment upon doing so.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This action was commenced November 7, 1902, to recover

$224.50, the alleged balance due to plaintiffs for services performed and materials used at the request of the defendant in the construction of a number of buildings named, including the "Kappa House," so called, in Madison, between April 1, 1901, and May 1, 1902. The defendant answered by way of admissions, denials, and counter allegations, to the effect that March 11, 1901, he entered into a written contract with the owners of the Kappa House for the erection and construction of a chapter house, to be completed on or before September 1, 1901, and for the payment of $10 a day as liquidated damages for any delay beyond that date, according to plans and specifications made for the same by Ferry & Clas, architects, and signed by the parties; that it was further agreed in the contract that all work should be executed in a thorough, complete, and most workmanlike manner, agreeable to such directions as should be given from time to time by such architects, or by Porter, the local superintendent, employed by the owners for that purpose, and that such work should be done to Porter's full and entire satisfaction; that upon making such contract the defendant, with the consent of the owners, sublet by parol contract to the plaintiffs the plastering work described in such plans and specifications; that the plaintiffs, well knowing all the terms and provisions of such written contract and such plans and specifications, so far as the same pertained to the plastering of the Kappa House, agreed in an oral contract to be bound in all respects by such written contract and by the terms and provisions of such plans and specifications to do such plastering work in accordance therewith; that the plaintiffs failed to furnish such materials or do such plastering as so agreed; and that said Porter declined and refused to certify that such plastering had been done according to the contract, for the reason that the same was not done according to such contract and plans and specifications, and that in doing so he acted honestly and in good faith, and that the plaintiffs delayed the

work to October 1, 1901. December 6, 1902, the defendant offered in writing to permit the plaintiffs to take judgment for $24.57, with interest from May 1, 1902, with costs, which offer was refused. At the commencement of the trial, January 17, 1903, and before any testimony was taken, it was agreed between the parties, in open court, that there was no controversy about any of the work mentioned in the complaint except the work on the Kappa House; that the plaintiffs were entitled to recover the amount demanded in the complaint, unless the same should be reduced by reason of the failure of the plaintiffs to properly conduct the work on the Kappa House. The plans and specifications, among other things, contained the following:

"They [the contractors] shall be subject to the direction of the architects or persons superintending the work . . . and by whose decision they shall abide in all questions as to the true meaning of the drawings and specifications. . . . Each contractor must include in his proposal and contract all the work and materials included in the specifications of the branch he is contracting for, even though it may belong to another branch of work. All materials must be the best of their respective kinds and all work must be executed in the best, most substantial and thoroughly workmanlike manner known to the trade in accordance with the intent and meaning of the drawings and specifications and *to the satisfaction of the architects and person superintending the work.*"

The oral contract of the plaintiffs to do the plastering upon the Kappa House appears to have been made on or about June 15, 1901.

At the close of all the testimony, the court, on motion of the defendant, directed a verdict in favor of the plaintiffs for $24.57, with interest thereon from May 1, 1902. From the judgment entered thereon against the defendant for the amount stated, the plaintiffs bring this appeal.

For the appellants there was a brief by *John C. Fehlandt,*

attorney, and *Rufus B. Smith,* of counsel, and oral argument by *Mr. Smith.*

For the respondent there was a brief by *Olin & Butler,* and oral argument by *John M. Olin.*

CASSODAY, C. J. The plaintiffs claim that the case was improperly taken from the jury. This seems to be based upon the theory that their contract made with the defendant through Findorff was separate from, independent of, and without reference to the plans, specifications, and contract which the defendant had previously made with the owners of the Kappa House in respect to the plastering. If the evidence on the part of the plaintiffs sustains such theory, then the verdict was improperly directed. The evidence is undisputed, and to the effect that March 11, 1901, the defendant entered into a written contract, including plans and specifications, with the owners of the Kappa House, to erect, construct, and complete the same on or before September 1, 1901, according to such plans and specifications, for $11,441; that, prior to that time, Porter—named therein as local superintendent—notified different contractors in Madison, including the plaintiffs and the defendant, in writing, that such plans and specifications were at his office, and invited such contractors, respectively, to examine the same and send him sealed bids for the different parts of the work; that the plaintiffs, pursuant to such notice, carefully examined such plans and specifications, which were identified by them in evidence, and thereafter sent to Porter their bid for the plastering work; that the defendant sent in a separate bid for the mason work, and also a separate bid for the whole work, and the defendant's bid for the whole work was accepted, and accordingly the defendant made the contract with the owners March 11, 1901, as stated; that subsequently the defendant sent the plans and specifications to the plaintiffs to give him

a bid on the job; that the plaintiffs then figured up and returned the plans and specifications, and about June 10, 1901, one of the plaintiffs met the defendant at the Fair Store block in the presence of Porter, and asked him who was going to do the plastering on the Kappa House and he replied that he did not consider the figures of the plaintiffs as any bid at all, and that he was sure that they would not get the job; that about June 15, 1901, one of the plaintiffs asked Findorff (a subcontractor of a part of the woodwork at the Kappa House) who was going to do the plastering on that house; that Findorff replied by asking why the plaintiffs did not go and see the defendant and do the plastering; that he then told Findorff that the plaintiffs would not see the defendant because he had said what he did at the Fair Store; that the plaintiffs wanted Findorff to help them get the contract before receiving the plans and specifications from the defendant; that Findorff then told him that he thought the plaintiffs were a little bit high on the work, and asked if the plaintiffs would not "do that work for twenty-one and thirty-five a yard;" that he replied that that would depend on what was to be done; that Findorff said, "A hard finish;" that he replied that the plaintiffs could not "do it for twenty-one and thirty-five;" that Findorff then asked what the plaintiffs wanted "for back plastering," and he replied, "Thirteen;" and that in a couple of days afterwards Findorff said, "Go ahead and do the work." The plaintiff who had such conversation with Findorff testified to the effect that he told Findorff what the plaintiffs' *"bid would be for that job;"* that the plaintiffs had previously looked it over "to determine what" their *"bid would be for that job;"* that they did that after the contract was let to the defendant; that before putting in their bid, prior to that time, they "looked over the plans and specifications carefully as to what was required in the plastering part of it;" that they "knew what the plans and specifications required as to plastering and lathing;" that

at that time they understood that if their bid should be accepted they would be controlled by such plans and specifications, but that at the time of the agreement with Findorff they did not understand that they were bound by such plans and specifications; that they did understand that *Mr. McCarthy* had the contract for the entire work; that they knew that they were making the contract through Findorff with the defendant, as the other party to the contract; that they knew the plaintiffs were subcontractors; that they did not expect to do the work differently from what the defendant had contracted to do it, and that they were bound by what they had agreed with Findorff; that June 25, 1901, being the next day after the plaintiffs commenced work on the Kappa House they received notice in writing from Porter, as such superintendent, that their lathers were "not carrying out the requirements of the specifications where they call for all outside lathing to be narrow laths, nailed with six galvanized iron cut nails to each lath;" that he should expect the lath then "on to be renailed in order to be satisfactory;" that he showed the letter to Findorff, who said Porter was the superintendent, and that the plaintiffs better do as he had stated; that they understood from that time on that Porter was superintendent, and that the plaintiffs must "do the work under his directions, not to his satisfaction;" that the plaintiffs did not get any certificate from Porter, and never asked for any. August 4, 1901, Porter notified the defendant in writing that the plaintiffs were delaying the work on the Kappa House, and that there would certainly be trouble unless something was done. Two days afterwards the defendant notified the plaintiffs in writing that they would be held responsible for all cost or trouble by reason of such delay. As indicated in the statement of facts, the specifications mentioned required all work to be executed "to the satisfaction of the architects and person superintending the work." The defendant's contract with the owners required all work to be executed in a

thorough, complete, and most workmanlike manner, and agreeably to such directions as should be given from time to time by the architects or Porter, as such local superintendent, and to such superintendent's full and entire satisfaction, without reference thereon to any other person; and it required payment to the defendant by the owners only "on the certificate of the superintendent." It is undisputed that the plaintiffs did not do the plastering to the satisfaction of Porter, and that he refused to give the defendant such certificate by reason of the failure of the plaintiffs to do the work according to such plans and specifications and contract.

The contention that the contract between the plaintiffs and the defendant was made without reference to such specifications and contract previously made between the defendant and the owners of the Kappa House is without foundation. The interviews between Findorff and one of the plaintiffs, which resulted in the making of the contract, were without significance or meaning, except when considered with reference to the prior contract and specifications. They say they told Findorff what the plaintiffs' "bid would be for the job." What job was thus referred to? Certainly the job the plaintiffs had previously looked over "to determine what" their "bid would be for that job." That manifestly occurred about a week before the conversation with Findorff, and after the defendant had sent the plans and specifications to the plaintiffs for the purpose of having them give him a bid on the job. At that time they say they figured and returned the plans and specifications, which figures the defendant rejected at the Fair Store when the defendant informed the plaintiffs that they would not get the job at such figures. It is manifest that the job thus referred to meant the job of lathing and plastering which the defendant had agreed to perform for the owners of the Kappa House. He was bound to perform, or get some one else to perform, that job in accordance with such plans, specifications, and contract. If the work should

be done in any other way it would be of no value to the defendant. This was well known to the plaintiffs for months before the conversation with Findorff. When, at the Fair Store, one of the plaintiffs asked the defendant who was going to do the plastering work on the Kappa House, he manifestly referred to the plastering work described in the plans, specifications, and contract upon which the plaintiffs had figured, and for which they had made an offer to the defendant, which he then rejected. The "job" repeatedly referred to in the conversation with Findorff manifestly referred to the lathing and plastering which such plans, specifications, and contract required to be done by the defendant. Of course it was competent for the defendant to make an entirely different contract with the plaintiffs. But no man of ordinary judgment would be expected to do so under the circumstances stated. The facts admitted by the plaintiffs clearly show that in case they got the job they expected to do the lath and plastering work on the Kappa House according to such plans, specifications, and prior contract, and that the negotiations through Findorff related only to the price to be paid by the defendant for the "job." All other matters and details were manifestly understood to be as stated in such plans, specifications, and prior contract. It is conceded that, had the plaintiffs attempted to enforce a lien against the Kappa House for such plastering work, they would have been bound to take notice of the terms and conditions of the original contract, and been controlled thereby. *Schroeder v. Galland,* 134 Pa. St. 277, 19 Atl. 632, 7 L. R. A. 711; *Shaw v. First Baptist Church,* 44 Minn. 22, 46 N. W. 146; *Shaver v. Murdock,* 36 Cal. 293; *Henley v. Wadsworth,* 38 Cal. 356. Here it stands admitted that the plaintiffs had actual notice of such plans, specifications, and prior contract, and agreed to do such plastering work according to the terms and conditions therein contained. Hence they were bound to do the work to the satisfaction of the architects and Porter, as the local super-

intendent, and they were only entitled to payment upon doing so.

The views expressed make it unnecessary to determine whether it was error for the trial court to hold, as a matter of law, that the plaintiffs were bound to know of the existence of a custom in the city that subcontractors took their contracts subject to the terms and conditions of the contract between the owners and the principal contractor, notwithstanding the evidence tended to prove that the plaintiffs had no knowledge of the existence of such custom. In addition to cases cited by counsel, see *Chateaugay O. & I. Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731. The trial court, however, properly held that, regardless of such custom, the plaintiffs were, as a matter of fact, bound by the terms and conditions of such original contract, and were only entitled to payment upon doing so.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER, J., took no part.

BORGMAN, Respondent, vs. CITY OF ANTIGO and another, Appellants.

December 15, 1903—January 12, 1904.

Municipal corporations: Special assessments: Sprinkling streets General city charter: Adoption.

1. The city of Antigo had no power under its special charter to sprinkle streets at the cost of lots fronting thereon. Before it attempted to take proceedings resulting in a special assessment against plaintiffs' lot, it adopted from the general city charter, subd. 40, sec. 925—52, Stats. 1898 (authorizing the city "to provide for sprinkling its streets at the expense of the city or of the lots or parts of lots fronting thereon"), but did

not adopt secs. 925—175 to 925—197*a*, Stats. 1898, or any part thereof, regulating the procedure necessary to authorize such sprinkling, and for the payment of the expenses thereof. *Held*, that thereby the city failed to adopt the whole legislative scheme providing for sprinkling of streets and charging the cost thereof to the property benefited, and that such failure was fatal, rendering the attempted adoption of subd. 40, sec. 925—52, invalid, and the special assessment on plaintiffs lot void.

2. In such case, the special assessment against plaintiff's lots cannot be upheld under ch. 40*b*, Stats. 1898, particularly sec. 926—10 thereof, where the findings of the trial court, supported by proof, disclose that the petition by which the proceedings were initiated was not signed by the owners of a majority of the frontage upon the street which was to be sprinkled, and that the city wholly omitted to contract with the persons who did the sprinkling.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action to declare illegal and void certain assessments of a sprinkling tax and to restrain its collection. Respondent resides in and owns a lot fronting on Fifth avenue in the city of *Antigo*. The proceedings of the common council of the city relied upon to fix the assessments were as follows: On April 19, 1901, the council by notice directed that the committee on streets and bridges look up the matter of sprinkling of streets. April 24th the committee reported that the sprinkling of Fifth avenue for the 1901 season by Aug. Brehmer would cost $500. The committee report was adopted by motion. At the same meeting a resolution was adopted instructing the committee on streets and bridges "to enter into an agreement with Aug. Brehmer to sprinkle Fifth ave., a macadam street, and that the same be commenced tomorrow, Apr. 25, 1901, for the time being until other arrangements can be made." April 29, 1901, the following proceedings were had: "Petitions read for sprinkling Fifth ave., a macadam street. By Alderman Briggs moved and seconded that the petition be referred back to the committee

and the committee be given further time to get more signatures. Motion carried." May 6th certain petitions were presented, and by motion all petitions or motions (were) rescinded, and it was ordered that the petition be referred back for legal signatures. The council further decided by motion "that no petition be considered unless the number of feet be given and fixed amount of said lots and number of feet to be sprinkled." May 9, 1901, it took action by motion "that Aug. Brehmer be hired at the rate of $3.50 per day for sprinkling streets in the petition as read pending the ten days for advertising for bids for sprinkler as provided by law, and that the said Aug. Brehmer be paid thirty-five cents per hour for sprinkling when a day's work is not done." Alderman Briggs was added "to the committee on streets and bridges to get signatures for sprinkling Fifth ave., a macadam street." May 14, 1901, at a special meeting called to act on the petition for the sprinkling of Fifth avenue, a macadam street, petitions were read and granted upon motion. A bid was received from A. F. Brehmer offering to sprinkle that part of Fifth avenue on which the property in this case abuts for $500. The motion to accept the bid of Aug. Brehmer was carried, as was a motion instructing the committee on streets and bridges "to enter into a contract with Aug. Brehmer as to how the streets are to be sprinkled, time and place." Upon motion it decided "that the sprinkling of streets be paid for monthly *pro rata.*" Brehmer was paid a total of $500 at different times by order of the common council out of the general fund for sprinkling that part of Fifth avenue in question; and on November 4th the council adopted a resolution directing that the sums be charged to lots as specified in a statement made by the city clerk apportioning the costs of sprinkling to the lot owners. The notice calling for bids was published on May 17th and May 24th, and provided for sprinkling from June 1 to November 1, 1901; such bids to be received on or before May 29th.

On the evidence submitted the court found that subd. 40, sec. 925—52, Stats. 1898, providing for sprinkling of streets at the cost of the city, or of the lots or parts of lots fronting thereon, had been adopted as an amendment to the charter of the city; that no resolution charging the cost thereof to the owner of the lots fronting on the street in question had been passed by the council; that the petition signed by respondent for the sprinkling of Fifth avenue neither contained the signature of the owners of a majority of the frontage, nor did such petition provide for or specify that the costs of sprinkling be charged to the owners of the lots; that no notice of a hearing in the matter was ever received by the plaintiff, nor was provision made for such a hearing—and held all the proceedings taken by the council based on the petitions illegal and void.

The portions of ch. 40*a*, Stats. 1898, covering the question before us, are contained in subch. XVIII, relating to "city improvements," and are embraced in secs. 925—175 to 925—197*a*, inclusive.

Upon the trial the court awarded judgment in respondent's favor, declaring the proceedings void, and restraining the city from any attempted enforcement of the tax. This is an appeal from that judgment.

For the appellants there was a brief by *Henry Hay*, attorney, and *Max Hoffman*, of counsel, and oral argument by *Mr. Hay*.

Geo. W. Latta, for the respondent.

SIEBECKER, J. The city contends it adopted subd. 40 of sec. 52, subch. VII (subd. 40, sec. 925—52, Stats. 1898), of what is known as the general city charter law, which provides that the city shall have power "to provide for sprinkling its streets at the expense of the city or of the lots or parts of lots fronting thereon." By sec. 175 of subch. XVIII (sec. 925—175, Stats. 1898), it is enacted that the city "may

cause [such] streets and alleys to be swept, sprinkled and cleaned," and "the expense of such work or improvement may be paid in whole or in part by the city, or by the property to be benefited thereby, as the council may direct, but in no case shall the amount assessed to any parcel of real estate exceed the benefit accruing thereto by such improvement except in case of sidewalk."

The city had no power under its special charter, before the attempted amendment, to sprinkle streets at the cost of the lots fronting thereon. It could not, therefore, exercise this power unless authorized by the adoption of subd. 40, sec. 52, subch. VII. That the attempted adoption of this subdivision by the city of *Antigo* is invalid appears clearly under the law as announced in *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869, and *State ex rel. Boycott v. Mayor,* 107 Wis. 654, 84 N. W. 242. It was therein decided that a city under special charter may adopt a part of the general charter law if it is an integral part of the law, complete in itself. But the part adopted must, however, "be a complete law in all its terms and provisions, when it leaves the legislative branch of the government, so that nothing is left over," save that the common council may determine whether it shall be adopted as a part of the law of the city. (*State ex rel. Boycott v. Mayor, supra.*) When the city chose to adopt only subd. 40, sec. 52, subch. VII, granting power to sprinkle streets at the cost of the city or of the lots or parts of lots fronting thereon, it wholly failed to adopt the legislative scheme for city improvements as set forth in subch. XVIII of this law, providing that cities may cause streets to be sprinkled, and charge the costs upon property to the extent it is benefited thereby as a special assessment.

Under the charter as it stood after the attempted amendment it contained no provisions embodying the conditions and the procedure prescribed by secs. 175–197*a,* inclusive, as necessary conditions to authorize it to make any of the im-

provements therein specified, and for the payment of the expense thereof either by the city or by the property to be benefited thereby. The result is that by the attempted amendment of the charter the city assumed to acquire a power under which it seeks by special assessments to impose the expense of carrying it into effect upon property in a manner wholly at variance with the requirements fixed by legislative action for the exercise of this municipal function. The steps to be taken to accomplish this purpose on the part of the city council, as prescribed in the sections of the general charter law, are deemed important and essential to protect these individual rights and the interests of the property owner. In *State ex rel. Boycott v. Mayor, supra,* the court, in speaking of these personal rights, said:

"This seems to be the very thing that the legislature intended to guard against—the guards which the property owner was intended to have—and it is the very safeguard which the council have denied him."

These omissions are fatal, and render the attempted adopting of subd. 40, sec. 52, subch. VII, as part of the city charter, invalid.

This result disposes of this branch of the case without inquiry into the question whether the expense of sprinkling streets can be charged by special assessment as a benefit on lots fronting on such streets, and we therefore express no opinion on the subject.

It is urged that the assessment, if not valid under the above conditions, was properly made within the powers conferred upon the city, as one incorporated by special act, under ch. 40*b*, Stats. 1898, relying particularly upon the provisions of sec. 926—10. This section prescribes that the expense of street sprinkling may be assessed to the owner of the property fronting on such street in proportion to the frontage of each owner, excepting street crossings. The assessment under these provisions was, however, clearly illegal.

Any action under this section requires, as a condition of the validity of the proceeding, that the petition to sprinkle a street be signed by the owners of the majority of the frontage upon the street or part of street which is to be sprinkled. The court found that the petition upon which the council assumed to act was not signed by the owners of a majority of the frontage of the part of the street sprinkled, and, further, that the city wholly omitted to enter into a contract with the persons who did the sprinkling. Upon examination of the evidence we find the court's conclusions as to these facts are supported by the proof. These omissions make the proceeding fundamentally defective and void. *State ex rel. Moore v. Ashland,* 88 Wis. 599, 60 N. W. 1001; *Dieckmann v. Sheboygan Co.* 89 Wis. 570, 62 N. W. 410.

It is unnecessary to consider other defects in the council proceedings, adverted to upon the argument.

By the Court.—Judgment affirmed.

DAWLEY, Respondent, vs. CITY OF ANTIGO and another, Appellants.

December 15, 1903—January 12, 1904.

***Borgman v. Antigo, ante,* p. 296, followed**

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Henry Hay,* attorney, and *Max Hoffman,* of counsel, and oral argument by *Mr. Hay.*

Geo. W. Latta, for the respondent.

SIEBECKER, J. The plaintiff is a resident and property owner of the city of *Antigo,* and brought this action to declare a special tax and assessment for sprinkling certain

streets in the city, invalid, and that the cloud attempted to be created upon the title to lots owned by him, as a result of such assessment, be removed. The facts in this case are identical with the facts in the case of *Borgman v. Antigo, ante,* p. 296, 97 N. W. 936, except that respondent in this case did not sign a petition for sprinkling any of the streets in the city of *Antigo.* The case is ruled by the *Borgman Case.* The judgment must therefore be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

MUNDT and another, Appellants, vs. SHABOW, Garnishee, Respondent.

December 16, 1903—January 12, 1904.

Garnishment: "Debts due or to become due:" Building contracts: Liability of owner.

A judgment debtor contracted to erect a building on the premises of the garnishee defendant for $1,005, under a contract whereby the garnishee was to pay the laborers and material men as the work progressed, on the contractor's orders, and any sum, over such payments for labor and material, remaining unpaid was to be paid the contractor on the completion of the building. The garnishment papers were served while the work was in progress, and over two months before the building was completed. *Held,* that the contract for the erection of the house was an entirety, and, when the garnishment was served, there was nothing absolutuely due nor a liability payable at a future time.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

In January, 1900, an oral contract was made between John Meidam, the principal defendant herein, and *William Shabow,* garnishee herein, for the erection of a dwelling house,

complete, for the sum of $1,005, which was to include the cost of all the material and labor. The workmen and materialmen were to be paid by *Shabow* from time to time as the work progressed, upon the consent or order of Meidam. On the completion of the house, and after all the bills were paid, the balance, between the amounts paid for material and labor and $1,005, was to be paid to Meidam. April 22, 1900, the plaintiffs obtained judgment against Meidam for the sum of $257.81 damages and costs. On June 20th *Shabow* was garnished in this action. The construction of the house was not completed until August or September. On October 6, 1900, *Shabow* had paid for labor and materials, on orders received from Meidam, the sum of $1,004.43, and had also some time prior to June 20th advanced to Meidam the sum of $20. Among the amounts paid by *Shabow* for material, after June 20th, were $231.90 for lumber, July 28th, and $182.99 for hardware, September 17th. The time within which liens for material furnished and labor rendered could be filed had not expired when the garnishment was served.

The cause was submitted for the appellants on the brief of *Joseph Roemer* and *Theo. Berg,* and for the respondent on that of *Albert H. Krugmeier.*

SIEBECKER, J. Was the garnishee, *Shabow,* indebted to Meidam, the judgment debtor, or had he property in his possession or under his control belonging to Meidam, when the garnishment process was served? The facts are practically undisputed. It appears from the finding of the trial court that the garnishee defendant, *Shabow,* and John Meidam made an oral agreement whereby Meidam agreed to build a house for *Shabow* for the sum of $1,005; that this sum was to be payment in full for all material and labor required to complete the building; that *Shabow* was to pay for the labor and material as the work progressed upon the order and direction of Meidam, and, if any sum remained due on this

contract above the amount paid for labor and material, Meidam was to receive it. The house was not completed until about September 1, 1900. The court held that the garnishee sustained no liability to the judgment creditor on this contract at the time the garnishment was served. The contract made between the parties required complete performance on the part of Meidam before any sum was due him, and *Shabow* owed nothing on the contract June 20th, except such amounts as he had obligated himself to pay for labor and material. While the house remained unfinished, no ground of liability in Meidam's favor existed. This court has repeatedly held that a garnishee is not liable unless it appears that he is absolutely liable to the principal defendant when the garnishment is served. The "debts due or to become due" under sec. 2768, Stats. 1898, relate to such as the garnishee owes absolutely, and have been construed to cover debts which are an absolute liability, though payable at some future date. *Smith v. Davis,* 1 Wis. 447; *Bishop v. Young,* 17 Wis. 46; *Foster v. Singer,* 69 Wis. 392, 34 N. W. 395; *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305, 56 N. W. 919; *Evans v. Rector,* 107 Wis. 286, 83 N. W. 292. The contract between Meidam and *Shabow* must be held to be an entirety, and when the garnishment was served there was nothing absolutely due nor a liability payable at some future time.

By the Court.—The judgment of the circuit court is affirmed.

MORGAN, Appellant, vs. PLESHEK, Respondent.

December 16, 1903—January 12, 1904.

Negligence: Personal injuries: Contributory negligence: Evidence: Conflicting inference: Question for jury.

In an action for personal injury alleged to have been caused by defendant's negligence, the evidence, stated in the opinion, considered, and *held* to present a situation from which a reasonable inference could be drawn in support of either party to the action on the question of defendant's negligence and of plaintiff's contributory negligence, and it was therefore error to direct a verdict.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries and for damages to appellant's property caused by respondent. Appellant alleges that the injuries were caused by respondent's negligence and carelessness in managing his horses and coming into collision with him, causing his buggy to upset, and throwing him into the street; resulting in injuries to his body, which made him sick and prevented him from attending to his business. These charges respondent denies. It appears by the evidence that, while appellant and respondent were using the public streets of the city of Shawano, their vehicles collided, causing the accident in question. Appellant was in his buggy, and had stopped to speak with one Holtz, on Main street at a point between the center and the west line of the street, running north and south, either near or on the south line of an alley running at right angles to the street. Respondent drove from this alley onto the street with his team of horses and lumber wagon. There was testimony tending to show that, while appellant was so occupying Main street, respondent drove out of the alley toward Main street over the sidewalk and an incline on the space between the sidewalk and the gutter, and then into the street, thereby col-

liding with appellant's vehicle, and tipping it and throwing him onto the street. There was evidence tending to show that respondent had ample space and opportunity to drive to the north of appellant's vehicle, and thus avoid colliding with it. Appellant testifies that his position was eight or ten feet south of the alley line, and that he did not observe respondent until he drove into his vehicle. Other witnesses testified upon this subject, some corroborating and others contradicting the appellant as to the position of his buggy in respect to the alley line, and the space afforded respondent, in the use of the street, for avoiding a collision with appellant's buggy. A number of witnesses were called by both parties, who testified to matter material to the issue, and whose evidence conflicted on important matters. At the conclusion of the testimony, respondent's counsel moved for a direction of the verdict in his favor. The court granted the motion, and awarded judgment dismissing the complaint.

For the appellant there was a brief by *Dreier & Winter,* attorneys, and *Wallrich, Dillett & Larson,* of counsel, and oral argument by *M. G. Eberlein.*

For the respondent there was a brief by *E. V. Werner,* attorney, and *E. M. Wescott,* of counsel, and oral argument by *Mr. Werner.*

SIEBECKER, J. The complaint charges respondent with negligence in driving his team of horses, and thereby causing his wagon to collide with appellant's buggy. It was shown that the parties were at the city of Shawano on the day of the accident, driving their teams, each consisting of two horses and a vehicle; that, while upon Main street, respondent's wagon collided with appellant's buggy, causing him to fall to the ground. At the time of collision, appellant had stopped his team, and was seated in the buggy, conversing with one of the witnesses (Mr. Holtz). He had driven southward, crossing the lines of an alley connecting at right

angles from the west with Main street. The respondent drove from the alley toward the street, crossing a sidewalk and an incline toward the gutter, and onto the street. The burden of the argument in this case was directed to the inquiries whether the trial court erred in holding that the evidence did not tend to show that respondent was guilty of negligence, as charged, and whether the evidence established that appellant was guilty of negligence contributing to produce the injury.

The rule is well settled that, if there is any credible evidence in the case from which a reasonable inference may be drawn in support of the claim of either party to the action, then the court cannot assume to decide the controversy as a matter of law. Under such circumstances, the questions of fact must be submitted to, and determined by, a jury. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Lewis v. Prien,* 98 Wis. 87, 73 N. W. 654. The trial court held the evidence did not tend to show that respondent was guilty of negligence in colliding with appellant's vehicle. There was testimony in the case that appellant had crossed and driven beyond the full width of the alley to a distance of from six to eight feet before he stopped his team on Main street, and that respondent could have cleared his buggy if he had driven directly and straight out into the street when coming from the alley. Some of the witnesses who observed the parties and location of the two teams testified that there was ample street space for a person driving from the alley to avoid encountering appellant's buggy, and nothing to prevent driving a team of horses to the right, if necessary, in passing from the alley onto Main street. The facts established by the situation itself indicate, if the jury had found that appellant had actually passed by the alley six or eight feet, then respondent must of necessity have turned toward his buggy before colliding with him. True, there was considerable testimony tending to show that respondent endeav-

ored to avoid coming in contact with appellant's vehicle which was clearly within his view when he approached the street. This emphasizes the fact that the evidence upon the question of negligence sharply conflicted, and that the jury might reasonably have drawn different inferences in support of the claims of either party. We are persuaded there was credible evidence in the case to justify the jury in drawing the inference that respondent was guilty of negligence in colliding with appellant's buggy, and that appellant was free from contributory negligence. On the other hand, the jury would have been justified had they found no actionable negligence against respondent. This question should have been submitted to the jury, under the rule that persons using the public streets must exercise reasonable care to avoid collisions with persons or vehicles. *Stringer v. Frost,* 116 Ind. 477, 19 N. E. 331; *Evans v. Adams Ex. Co.* 122 Ind. 362, 23 N. E. 1039; *Vollner v. Berens,* 50 Wis. 494, 7 N. W. 371; *Belton v. Baxter,* 58 N. Y. 411; *Quirk v. Holt,* 99 Mass. 164.

We need not call further specific attention to the evidence upon the question of appellant's negligence as contributing to the injury. It does not appear specifically whether the court put its ruling upon this ground, or not; but, since it was included in the motion for the direction of a verdict, we must assume the court concluded that appellant was guilty of a want of ordinary care, contributing to produce the accident. If his testimony, as well as other evidence adduced, be taken as true, it cannot be said, as a matter of law, that any want of ordinary care on his part proximately contributed to the injury. If the jury had found from the testimony of appellant and others who were eyewitnesses to the occurrences that he exercised ordinary care in stopping his vehicle on the street and at the place specified, and that he was unaware of respondent's approach or that his safety was in any way imperilled, it could not be held as conclusively established that he was guilty of want of ordinary care, con-

tributing to produce the accident. Yet by a different inference of fact from the evidence he might be deemed guilty by the jury of contributory negligence. When no conflicting reasonable inferences can be drawn from the evidence as to the question of negligence, it is a matter of law for the court; but, when the evidence is such that conflicting reasonable inferences may be drawn, it is a matter for the jury. *Curry v. C. & N. W. R. Co.* 43 Wis. 665. This state of the evidence left the question of appellant's contributory negligence uncertain, upon the proof, and therefore should have been submitted under proper instructions from the court. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Maanum v. Madison,* 104 Wis. 272, 80 N. W. 591.

From this it results that the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

VALENTINE-CLARK COMPANY, Appellant, vs. SHAWANO COUNTY, Respondent.

December 16, 1903—January 12, 1904.

Taxation: Foreign corporations: Personal property: Situs for assessment: "Merchants' goods, wares, and commodities."

Plaintiff, a foreign corporation dealing in cedar posts and poles, had its yards and a resident agent at New London, in Outagamie county. On the first of May it owned a quantity of cedar posts and poles cut and piled at Aniwa, in Shawano county, where it inspected and pealed them, and then gradually shipped them as cars could be obtained, mostly to its New London yard, but some directly to purchasers as orders were received at its New London office. Sec. 1040, Stats. 1898, provides that the personal property of a foreign corporation, having an agent residing in this state, shall be assessed in the district where the agent resides; that "merchants' goods,

wares, and commodities kept for sale . . . shall be assessed in the district where located;" that saw logs and timber which are to be sawed or manufactured in this state by or for the owner shall be assessed in the district where the mill is located, and that saw logs, etc., and other articles not being manufacturer's stock, shall be assessed in the district where the owner or agent in charge resides. Plaintiff returned its property at Aniwa for assessment and taxation at New London, but it was also assessed, and taxed as merchants' stock in Shawano county. Plaintiff paid the taxes so levied in Shawano county under protest, and brought suit to recover them back. *Held*, that such poles and posts were merchants' goods, wares, and commodities, and were "kept for sale" in Shawano county, within the calls of said sec. 1040, and hence taxable there.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff filed a claim with the county board of *Shawano county* to recover personal property taxes for 1900, paid by it under protest. The claim being disallowed by the county board, the plaintiff appealed to the circuit court, where the action was tried by the court, and the appeal dismised upon findings of fact, and the plaintiff appeals to this court. Many of the facts were stipulated, and there was no very serious dispute as to the other facts. It appeared that the plaintiff was a foreign corporation dealing in cedar posts and poles, and having a yard at the city of New London, Outagamie county, where it also has a resident agent in charge of its business; that on May 1, 1900, it owned considerable quantities of cedar posts and poles which had been cut in the vicinity and were piled in the village of Aniwa and Birnamwood and the town of Aniwa, *Shawano county;* that the plaintiff's custom was to inspect and peel the posts and poles at these places; that no agent or office was kept at either of these places, but the posts and poles were gradually shipped away as cars were obtained, the greater part being shipped to the New London yard to await sale, but some portion being shipped directly to purchasers as orders were received at the New London office. The plaintiff's evidence

tended to show that only ten to twelve per cent. was shipped direct to customers, but there was other proof tending to show that the amount so shipped was considerably larger. The plaintiff returned this property for assessment and taxation at New London, but it was also assessed and taxed as merchants' stock in *Shawano county,* and the taxes so levied in *Shawano county* and paid under protest are now sought to be recovered in this action.

C. H. McDonald, attorney, and *Charles E. Vroman,* of counsel, for the appellant.

E. V. Werner, for the respondent.

WINSLOW, J. The question in this case is whether the posts and poles piled at Aniwa and Birnamwood, in *Shawano county,* and awaiting shipment, were taxable in that county, or in Outagamie county, where the plaintiff's yard was located and their agent resided. The question depends upon the construction to be given to the terms of sec. 1040, Stats. 1898. Whatever might be our conclusion as to the proper construction of this section as an original proposition, the question seems to have been already settled by the decisions of this court. So far as necessary to be stated, that section provides generally: That personal property shall be assessed in the district where the owner resides, except as otherwise provided. That if the owner be a nonresident, or a foreign corporation, having an agent residing in this state, it shall be assessed in the district where the agent resides, but, if there be no agent, then in the district where the same is located, except as otherwise provided. "Merchants' goods, wares, and commodities kept for sale . . . shall be assessed in the district where located." Saw logs and timber which are to be sawed or manufactured in any mill in this state by or for the owner shall be assessed in the district where the mill is located, but saw logs, timber, ties, lumber, and other articles, not being manufacturers' stock, shall be

assessed in the district where the owner or agent in charge of the same resides.

It is clear from our decisions that such property as is in question here, if owned, as in the present case, by a lumber or timber merchant, and kept for sale, is covered by the words "merchants' goods, wares, and commodities." Being such, it is not included in the subsequent clause providing that saw logs, timber, ties, lumber, and other articles, not being manufacturers' stock, is to be assessed where the owner or agent in charge resides. *Mitchell v. Plover,* 53 Wis. 548, 11 N. W. 27; *Torrey v. Shawano Co.* 79 Wis. 152, 48 N. W. 246. The question simply is, therefore, whether the posts and poles were "kept for sale" in *Shawano county.* The appellant's contention is that they were really only in transit to the yard at New London, and cannot in any proper sense be said to have been "kept for sale" or "located" in *Shawano county.* This contention is fully answered by the decision in the case of *Sanford v. Spencer,* 62 Wis. 230, 22 N. W. 465. That was a case where lumber owned by nonresident lumber merchants, having no agent in this state, was piled at Spencer, and from there was shipped partly to purchasers and partly to the owners' yards in Illinois, and it was held to be merchants' goods kept for sale at Spencer because of the fact that part of it was shipped directly to customers, although no sale was made at Spencer. In that case it was said that under the evidence there could be no doubt that all would have been sold and shipped to customers directly from Spencer had the demands of customers been sufficient. The same reasoning is equally applicable to the present case, and is controlling.

By the Court.—Judgment affirmed.

GROSS, Appellant, vs. HECKERT, Respondent.

December 16, 1903—January 12, 1904.

Landlord and tenant: Absolute assignment of lease as security: Parol evidence: "Real party in interest:" Failure to deliver possession: Knowledge of lessee's intentions: Damages: Statute of frauds: Value: Sale as evidence: Advance payment to employee: Delay in making sale: Storage and care: Value of term.

1. It is competent to show by parol evidence that an assignment of a lease, absolute on its face, was given as security only.
2. In an action to recover damages for breach of a lease, it appeared that the lessee had assigned the lease, in form absolutely, to secure an obligation which never ripened into an indebtedness due or to become due, and which had been wholly extinguished before the commencement of the action. *Held*, that the lessee was the real party in interest and could maintain the action in his own name.
3. The damages recoverable for breach of contract are such as may fairly and reasonably be considered the natural and proximate result thereof, and in the light of circumstances, special or otherwise, known to both parties at the time of making the contract, may reasonably be supposed to have been in contemplation by them as the probable result of such breach.
4. Where a lease is made covering in whole or in part an outstanding term, the circumstances being such that the lessor knows or ought to know that his lessee will not be able to enjoy such term according to the agreement, the lessor is deemed guilty of a wrong of a fraudulent character, rendering him liable not merely for the rent which has been paid in advance, with interest, but also for special damages under the rule therefor applicable to ordinary contracts.
5. A contract to sell an article, which contemplates that the vendor shall first manufacture or produce it by the use of labor and capital, is not within the statute of frauds (sec. 2308, Stats. 1898).
6. In an action to recover damages for breach of a lease of a store building, it appeared that at the time the lease was made the lessor knew that the lessee intended to use the premises for saloon purposes and proposed to prepare therefor prior to the commencement of the term. *Held*, that the plaintiff might recover the difference between the cost of saloon fixtures, appliances, and liquors which he had ordered for use in the de-

mised building and their market value in cash at the time of the breach, with interest from such time.

7. In such case, the value at the time of the breach may be established by evidence of a sale made within a reasonable time after the breach and in a manner reasonably calculated to produce the fair market value; but in the absence of such a sale the value may be established by other competent evidence.

8. In such case, evidence that the lessee paid a certain sum for a release from liability on a contract for the purchase of a stock of liquors, which were never delivered, does not establish that the market value of the liquors at the time of the breach was the difference between the contract price and the amount so paid for such release.

9. In such case, an advance payment made by the lessee to a person engaged by him to aid in conducting the saloon business is not a proper element of damages in an action for breach of the lease.

10. In such case, a sale of the property purchased by the lessee eight months after the breach of the lease is *held* too remote to be reasonable, in the absence of some explanation, and some evidence that the property at that late date would probably have brought substantially the price which might have been obtained at or about the time of the breach.

11. In such case, no allowance for storage or care of the property purchased by the lessee should be made him in assessing his damages for breach of the lease except as a part of the legitimate expenses of a sale made to create evidence of value.

12. In such case, the lessee would be entitled to recover as an element of damages any excess in the value of the term over the agreed rent, but evidence that the premises were exceptionally valuable for saloon purposes, and that the prior tenant had made a profit of $2,000 per year in that business, is *held* too uncertain to warrant an award on that ground.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action for damages for breach of contract. Plaintiff claimed that on February 6, 1901, defendant in writing leased to him a two-story brick building and its appurtenances in the city of Appleton for the purposes of a saloon, the term of the lease being five years from April 1, 1901, with an option for an additional term of five years, the rent charge being $75 per month payable in advance on the first

day of each month; that in and by said lease defendant agreed to put plaintiff in possession of the leased property April 1, 1901; that defendant knew at the date of the lease that plaintiff intended to keep a saloon on the premises and to prepare therefor prior to April 1, 1901, by purchasing furniture, fixtures, and other articles necessary for such business; that relying upon obtaining possession of the premises pursuant to such lease plaintiff spent much time and money making such preparations. The rental value of the premises for the term of five years was $2,000. Plaintiff fully performed the conditions of the lease on his part. Defendant failed to do so. He did not deliver possession of such premises to plaintiff April 1, 1901. At the time of the making of such lease they were occupied by a lessee who continued in possession, under contract with defendant, for several months after the commencement of the plaintiff's term. They were specially valuable for the purposes for which plaintiff leased the same. He suffered damages by reason of defendant's breach of agreement, to the amount of $6,500 in the whole, for which sum judgment was demanded with costs.

The answer admitted the execution of the lease, but denied that defendant had knowledge at the date thereof that plaintiff purposed using the premises for a saloon business. The allegations of the complaint in respect to damages were put in issue, and it was alleged that the action was not brought by the real party in interest in that, before the commencement thereof, the lease was assigned by plaintiff to the S. C. Herbst Importing Company.

The cause was referred to F. S. Bradford to hear, try and determine. Upon the trial there was evidence establishing or tending to establish the following facts: Soon after the lease was made it was assigned to the S. C. Herbst Importing Company mentioned in the answer, solely as security. The defendant had knowledge at the time the lease was made that plaintiff purposed using the premises for a saloon and to pre-

pare therefor before the commencement of his term. The premises were more than ordinarily valuable for a saloon business. In the course of plaintiff's preparations for occupying the leased premises he contracted for and incurred liabilities as follows: For saloon fixtures, $917; matting, $150; glassware of various kinds, $386.99; gas fixtures, $136; liquors, $1,623.15. By reason of defendant's failure to deliver possession of the leased premises as agreed, plaintiff was unable to use the property so contracted for. The saloon fixtures were not suitable for any other premises. The value of such fixtures to plaintiff under the circumstances, was $650. Plaintiff never took the matting, though it was made specially for him. It was not salable to any other person at any price. Plaintiff partially paid for the glassware, and became bound to pay the balance of the indebtedness therefor. The market value thereof for a resale would not exceed sixty per cent. of the cost to plaintiff. The value of the gas fixtures on a resale would not exceed $25. Plaintiff made a payment upon the indebtedness for liquors. Upon finding that he could not get possession of the saloon building as agreed, he obtained a release of his obligation to take the liquors by paying $162.85 to the vendor. There was no evidence of the market value of the liquors. Plaintiff hired a person to assist him in the saloon business, in anticipation of enjoying his lease. He paid such person $50 in advance. He incurred other expenses in small amounts. Upon finding that he would be unable to obtain possession of the premises he advertised the saloon fixtures for sale at auction, incurring an expense of $24.54 in so doing. He was prevented from making such sale by the conduct of the defendant. There was evidence as to the leased premises being specially valuable for the saloon business, but none as to whether plaintiff could have obtained other premises for his contemplated business.

The referee found as facts, in addition to the undisputed matters which cover the making of the lease and the failure

of the defendant to put plaintiff in possession of the leased premises, and that such premises were specially valuable for a saloon business, the following: January 1, 1900, plaintiff agreed with the S. C. Herbst Importing Company that they should furnish him liquors to the amount of $1,623.15. None of the goods were delivered. After May 1, 1901, plaintiff agreed to give the company $162.85 as damages for failure on his part to take the goods. Prior to April 1, 1901, plaintiff ordered 150 yards of rubber matting, agreeing to pay $150 therefor. He did not pay anything upon such order. The goods were never delivered. The agreement for the goods was not in writing, nor was there any memorandum thereof. March 15, 1901, plaintiff purchased electrical and gas fixtures at $136. The value thereof on May 1st, and at the time of the commencement of the action was $90. He made a conditional purchase of saloon fixtures at $917, paying $150 thereon. He did not carry out the terms of the conditional sale, nor take the goods. The value thereof on May 1st and at the time of the commencement of the action was $815. He made an agreement with John Elsner, a bartender, to work for him after April 1, 1901, paying him $50 in advance. He purchased glassware to the amount of $386.99, paying $100 on account thereof. The goods were never delivered. At the commencement of the action they were worth $367.66. Plaintiff incurred expenses in various small amounts, preparing for the saloon business, aggregating $50. His prospective profits were six cents. He was unable to obtain possession of the leased premises April 1, 1901, because they were occupied by a tenant. When the lease was made defendant expected to be able to deliver the premises to plaintiff as agreed. Defendant did not get possession thereof till September 15, 1901. Plaintiff demanded possession of the premises April 1, 1901, but defendant was unable to deliver the same. About May 1, 1901, plaintiff informed defendant that he could not longer wait and must be made good in

damages for defendant's breach. Plaintiff paid defendant $10 on the lease as rent, which was returned. The value of the leased premises was not more than the rent reserved. February 18, 1901, the S. C. Herbst Importing Company guaranteed in writing the payment of the rent. On that day the lease was assigned, transferred and set over to said company. The assignment was absolute in form.

As conclusions of law the referee found that plaintiff was not the real party in interest and that the complaint should be dismissed with costs. Such findings and conclusions were confirmed by the circuit court, proper exceptions being filed to raise the questions discussed in the opinion.

Plaintiff appealed.

Glenway Maxon, for the appellant.

For the respondent there was a brief by *Henry D. Ryan* and *J. E. Lehr,* and oral argument by *Mr. Lehr.*

MARSHALL, J. We are unable to discover any warrant in the evidence for the decision that plaintiff, before the commencement of this action and the happening of the events upon which his claim for damages is based, assigned his lease to the S. C. Herbst Importing Company, incapacitating himself from bringing such action for want of being the real party in interest. The evidence is clear that the assignment, if one was effected, though absolute in form, was for security only. It seems that it must have been supposed in the court below, either that it was not competent to show by parol evidence the real nature of the assignment, or that a mere mortgaging of the leasehold interest rendered the mortgagee the real party in interest to prosecute for a breach on the part of the lessor. The law is so clearly the other way as to both propositions that it seems unnecessary to spend time discussing the matter at any great length. As to the first proposition the following decisions of this court are decisive: *Butler v. Butler,* 46 Wis. 430, 1 N. W. 70; *Rockwell*

v. Humphrey, 57 Wis. 410, 15 N. W. 394; *Manufacturers' Bank v. Rugee,* 59 Wis. 221, 18 N. W. 251; *Lamson v. Moffat,* 61 Wis. 153, 21 N. W. 62; *First Nat. Bank v. Damm,* 63 Wis. 249, 23 N. W. 497; *McCormick v. Herndon,* 86 Wis. 449, 56 N. W. 1097; *Bertschy v. Bank of Sheboygan,* 89 Wis. 473, 61 N. W. 1115; *Jourdain v. Fox,* 90 Wis. 99, 62 N. W. 936. As to the second point the following decisions are likewise clear: *Landauer v. Espenhain,* 95 Wis. 169, 70 N. W. 287; *Chase v. Dodge,* 111 Wis. 70, 86 N. W. 548. The test of whether one is the real party in interest within the meaning of the statute is, Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation? The rule is stated in a recent ably written work thus:

"The real party in interest, within the meaning of this provision of the code, is the person who will be entitled to the benefits of the action if successful; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in or connection with it." 15 Ency. Pl. & Pr. 710.

A mere mortgagee of an interest in realty, which, at the best for respondent, was the situation of the assignee of the lease, possesses only a lien to the extent of the obligation secured by the mortgage. Independently of such obligation it constitutes no interest whatever in the thing mortgaged. The extinguishment of the obligation, without any other act whatever *ipso facto* extinguishes the lien. *Brinkman v. Jones,* 44 Wis. 498; *Fred Miller B. Co. v. Manasse,* 99 Wis. 99, 74 N. W. 539. The evidence in this case shows that the obligation to secure which the assignment of the lease in question was made, if one was in fact effected, never ripened into an indebtedness due or to become due, and that it was wholly extinguished before the commencement of this action, thereby leaving the plaintiff not only the real party in interest to

prosecute the cause of action in suit, but the sole party interested therein.

As appears by the statement of facts, the referee neglected to find on the subject of respondent's knowledge that appellant intended to use the leased premises for a saloon business, and to prepare therefor so as to be able to commence such business at the beginning of his term. That was a matter in issue on the pleadings and was an important feature of appellant's case as bearing on the damages recoverable of the respondent, under the rule in *Hadley v. Baxendale,* 9 Exch. 341, which has been often approved in this court, and applied, as will be seen, to the particular class of cases to which the one before us belongs. Such rule may be stated as follows: The damages recoverable for breach of contract are such as may fairly and reasonably be considered the natural and proximate result thereof, and in the light of circumstances, special or otherwise, known to both parties at the time of making the contract, may reasonably be supposed to have been in contemplation by them as the probable result of such breach. The number of cases here, where that has been applied is very large. The following are a few of them: *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318; *Hibbard v. W. U. Tel. Co.* 33 Wis. 558; *Candee v. W. U. Tel. Co.* 34 Wis. 471; *Hammer v. Schoenfelder,* 47 Wis. 455, 2 N. W. 1129; *McNamara v. Clintonville,* 62 Wis. 207, 22 N. W. 472. The rule is usually stated omitting the feature as to special circumstances, as the cases where that is important are exceptional. The following are in the exceptional class: *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119. That it applies where, as in a case like this, a lease is made covering in whole or in part an outstanding term, the circumstances being such that the lessor knowns or ought to know that his lessee will not be able to enjoy such term according to the agreement, is held in *Poposkey v.*

Munkwitz, 68 Wis. 322, 331, 32 N. W. 35, to which appellant's counsel refers and upon which he confidently relies. As there shown, ordinarily the rule of damages for failure of title to a leasehold term is the same as for such failure as to an absolute conveyance of realty with warranty. The amount recoverable is confined to the consideration, with interest. If rent has been paid to apply upon any portion of the term which the lessee is prevented from enjoying, that may be recovered with legal interest. If no sum has been so paid, the damages are deemed to be nominal only. The exceptional circumstance referred to, of the lessor being chargeable with knowledge at the time of making the lease that his lessee will not be able to take possession of the leased premises and enjoy his term according to agreement is deemed to render him guilty of a greater wrong than that of a mere breach of contract to assure the lessee in the quiet enjoyment of the leased premises. He is deemed to be guilty of a wrong of a fraudulent character and amenable to damages under the general rule applicable to contracts.

The evidence was substantially undisputed and conclusive that when the lease was made respondent knew the use the premises were to be devoted to and that appellant purposed preparing, prior to the commencement of his term, for the enjoyment thereof. There should consequently have been a finding accordingly, and appellant should have been given the benefit of the state of the case thus shown to exist in considering the evidence and making findings as to damages caused by the breach complained of. The errors in not doing so are here for correction, appellant having specially requested proper findings on the subject and saved exceptions to the refusal to make them.

Appellant requested a finding to the effect that, relying upon the agreement to put him in possession of the leased premises, he incurred obligations and paid out money in anticipation of enjoying his term, which was largely lost by

reason of respondent's failure to enable him to do so. The evidence was undisputed in regard to that matter. That error was committed in refusing to make the findings requested follows necessarily from what has been said.

According to the evidence, one of the obligations incurred by appellant as stated in the foregoing paragraph is $917 for saloon fixtures, which, by reason of the breach, were not worth to him, at the time thereof, to exceed $650, and he thereby suffered a loss of $267. The finding that the value of the fixtures at the time of the commencement of the suit was $815 seems not to be based upon any evidence in the case, and to have been made without appreciating the fact that the true measure of appellant's damages in respect to the matter was the difference between the contract price for the property and the market price thereof in cash at the time of the breach, with interest from such time. Upon just what theory the finding of $815 was made we are unable to discover. The error assigned in respect thereto is sustained.

The item of $150 damages claimed by appellant on account of matting, which the undisputed evidence shows became worthless on his hands because of the breach complained of, seems to have been rejected upon the theory that the contract for the property was not enforceable by reason of sec. 2308, Stats. 1898, since it was wholly verbal and executory, and nothing was paid thereon, nor was any part of the property ever delivered. That statute relates only to executory sales of property; not to contracts for the manufacture and sale of property. *Meincke v. Falk,* 55 Wis. 427, 13 N. W. 545; *Boyington v. Sweeney,* 77 Wis. 55, 58, 45 N. W. 938; *Goodland v. LeClair,* 78 Wis. 176, 178, 47 N. W. 268. The distinction between a contract of sale where there is nothing for the seller to do but to tender the property, and a contract requiring the executory vendor to manufacture or produce the article by the use of his capital and labor and then tender the same, the former being within and the latter without the

statute, is clearly shown in *Meincke v. Falk, supra.* It is easily seen that a mere contract of sale, contemplating thereafter only a tender of the subject thereof upon the one side and payment of the consideration therefor upon the other, is quite different from such as the contract here. That the statute deals with the former only is clear from the fact that by its terms it plainly indicates that a part execution of the contract by one party, accepted by the other, takes it out of the statute. A contract to sell an article which contemplates that the vendor shall first manufacture it by the use of labor and capital implies that the application of such labor and capital in the execution of the agreement is to be accepted as the work of manufacture progresses, contingent upon the thing, when produced, corresponding to that ordered. The result is that, as soon as the process of manufacture commences the contract is no longer wholly executory. When the article contracted for is ready for delivery and the situation is such that it might then form the subject of a sale within the meaning of the statute, the real contract has been substantially performed upon one side. To allow the statute of frauds to then interfere with the final consummation of the agreement would be a use thereof to perpetrate fraud instead of to prevent fraud. That is not allowable. There should have been a finding to the effect that appellant was damaged by the breach complained of, on account of loss on the matting, in the sum of $150 and interest.

Appellant complains because of the finding that the gas and electrical fixtures—costing $136 and by reason of respondent's fault left of no account to him except what he could obtain therefor at a resale—were worth $90; and that the glassware, costing $398.99 and by respondent's fault left in the same situation, was reasonably worth to appellant $367.66. Such complaint seems to be fully warranted. The finding appears to have been made quite independently of the evidence or the correct rule of law applicable to the subject. As

before indicated, the measure of appellant's damages as to such matters was the difference between the cost price of the goods and the amount which, under the circumstances, the same were reasonably worth at the time of the breach. Had appellant resold the property in a way reasonably calculated to produce the fair market value thereof, the amount thus obtained would have been evidence of such value; and had a sale been made in a way reasonably calculated to produce the best price obtainable, the net result would have been binding upon respondent as the true value. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513. Not having so established the fair market value of the property at the time of the breach, it was necessary to do so by other competent evidence. Evidence was produced in that regard, and, looking at the same as favorably as we reasonably can for respondent, the damages suffered by appellant as to the electrical and gas fixtures was $111, and as to the glassware, $154.80. A finding to that effect should have been made.

Complaint is made because of there being no finding as to damages suffered by appellant on the stock of liquors for which he incurred a liability of $1,623.15 and paid $162.85 for a release therefrom. It is sufficient to say on that subject that appellant wholly failed to produce any evidence as to the market value of the goods at the time of the breach; hence there was no opportunity for a finding to be made in respect to the matter, based upon the rule of damages applicable thereto. It is quite likely that if the settlement between appellant and his vendor, whereby a sum of money was paid to the latter for a release of the former from his indebtedness, were regarded as establishing the difference between the amount of such indebtedness and the value of the property involved at the time of the breach, it would be as favorable to respondent as if such value were established by competent

evidence. But the evidence of the settlement does not constitute legal proof of the essential fact; therefore the claim for damages on this branch of the case wholly fails. For aught the record shows the stock of liquors at the time of respondent's breach may have been worth much more than the purchase price thereof.

Further complaint is made because only $50 in the aggregate was found to have been paid out by appellant in addition to expenditures for merchandise during the course of his preparations to occupy the leased premises. In support of that, reference is made particularly to the circumstance that appellant made an advanced payment of $50 to a person engaged by him to aid in conducting the saloon business. Since only such damages are recoverable as under all the circumstances both parties at the time of entering into the contract may reasonably be presumed to have anticipated would in the natural course of things probably result from a breach thereof, it is difficult to see how a loan of money, so to speak, in anticipation of the borrower repaying the same by the performance of labor, as in this case, can be recovered because such payment was prevented. The purchase by appellant of furniture and stock for use in running the saloon business, in anticipation of enjoying the leased premises, respondent should have reasonably expected would occur under the circumstances; but not the hiring of assistants and the payment to them of wages in advance. The former would and the latter would not be circumstances happening according to the natural course of things within the rule above stated. The advance of wages being thus not recoverable, we are unable to reach a conclusion that the finding of the court under consideration is contrary to the clear preponderance of the evidence.

There was evidence to the effect that appellant paid $60 for storing and caring for the saloon fixtures during some eight months subsequent to the breach complained of, and

$24.50 in attempting to make an auction sale thereof November 25, 1901, with the other property purchased for use in the saloon business, which sale he was prevented from making by reason of interference on the part of respondent, in that the latter served a notice on the auctioneer to the effect that if he proceeded with the sale as contemplated he would incur pecuniary responsibility, as the property was involved in litigation and the title thereto in dispute. Error is assigned because no findings were made to the effect that appellant suffered recoverable damages in respect to such matters to the amount of the expenditures mentioned. The sole legitimate purpose of the proposed sale was to create evidence of the market value of the goods at the time of the breach complained of. The result of the sale, had one been made under circumstances fairly calculated by the result to indicate such value, would have been competent evidence thereof. One of the important requisites of such circumstances was such proximity of the time of the sale to that of the breach as to render the result not likely to be unfavorably influenced by conditions occurring subsequent to such breach. 2 Mechem, Sales § 1642. Counsel's theory in insisting upon allowance of expenditures in preparing for the auction sale, we assume, is that appellant had a right to create evidence in his behalf in the manner attempted; that up to the time of the wrongful interference, rendering his effort in that regard ineffective, all requisites were satisfied to cause such efforts to produce legitimate evidence; that the value of the property thus shown would have been the sum received upon the sale less the expenses incurred, thus making good to him such outlay; and that he should not, therefore, be prejudiced as to such expense by respondent's conduct. Whether mere fruitless expenditure of money by one party in an effort to obtain evidence on the subject of damages in a case like this, though the barrenness of the result be produced by his adversary, is a proper element of damages recoverable in the

action, is by no means free from doubt. We need not, however, solve it here, since we are unable to hold that if the proposed sale had taken place the result would have constituted legitimate evidence in the case. The time the sale was to take place was too remote from the date of the breach to be deemed reasonable in the absence of some explanation thereof and some evidence that the property at the late date would probably have brought substantially the price obtainable at or about the time of the breach. For that reason, if for no other, it is considered that no error was committed in not finding in appellant's favor as to the expenses of the proposed sale. The same reason condemns the claim for $60 for storing and caring for the saloon fixtures. Since the difference between the value of the property at the time of the breach and the purchase price thereof, with interest upon such difference from such time, is the limit of legal damages, no allowance for storing and caring for the property could be awarded except as part of the legitimate expenses of a sale made to create evidence of such value.

Error is assigned on the failure to find that the value of appellant's term exceeded the rent reserved therefor, and to award him damages for the excess. Since, as we have seen, because of respondent's wrong in assuring appellant a term which he should have known he could not make good as agreed, he is liable for full damages under the rule we have stated, that necessarily includes any excess in the value of the term over the cost agreed upon, so far as warranted by evidence, enabling the court to measure it with some reasonable degree of certainty; and the same should have been found and awarded to appellant. The difficulty of appellant's position in respect to the matter, however, is that there does not seem to be any evidence upon which the court below could properly have acted in his favor. There is general evidence as to the leased premises being exceptionally valuable for the business they were leased for, and other evidence

to the effect that the tenant who occupied the premises before the commencement of appellant's term made a profit of $2,000 per year. That may all be true, and yet the value of the use to appellant not have been in excess of the rent reserved, since for aught that appears he could have rented other premises just as valuable in the same locality, and at the same or a less price. *Poposkey v. Munkwitz,* 68 Wis. 322, 32 N. W. 35. Again, the fact that another person made $2,000 per year using the premises for a saloon business is not proof that appellant could have established such a business and conducted it with like success. The personal element in the matter is an important feature. That would be obvious without direct evidence in respect thereto; but such evidence was given and preserved in the record. In a proper case and upon proper evidence, a person damnified by the wrongful conduct of another, preventing such person from making profits in a business enterprise which he otherwise would have made, may recover of such other for his loss; but, as has often been said by this court, the law in that regard is quite liable to operate unjustly and oppressively, and therefore it should be administered with caution and with strict regard to the rules applicable to the establishment of the damages. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Wright v. Mulvaney,* 78 Wis. 89, 46 N. W. 1045; *Pewaukee M. Co. v. Howitt,* 86 Wis. 270, 56 N. W. 784; *Bierbach v. Goodyear R. Co.* 54 Wis. 208, 11 N. W. 514; *Anderson v. Sloane,* 72 Wis. 566, 40 N. W. 214. So it is held that prospective profits should not be allowed without evidence to base the same on sufficiently certain to remove the result from the realms of pure conjecture. There are many instances where it has been held that past profits of a business constitute a legitimate basis from which to estimate, with sufficient certainty to satisfy judicial requirements, future profits in the same business conducted in substantially the same manner. *Treat v. Hiles,* 81 Wis. 280,

50 N. W. 896, and *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785, are instances of that. But there is no authority, we venture to say, to support the proposition that what one person realized for profits in a business conducted in a particular location, such business being of a character dependent largely upon the personal following and qualities of the proprietor, constitutes a legitimate basis upon which to estimate with judicial certainty, so to speak, what another person might make in the same location by engaging in the same business, upon the former removing to a new location, taking with him, so far as practicable, the good will of the old one, as the evidence shows was done in this case. Profits based on such uncertain data would be too speculative by far to be worthy of judicial recognition.

The result of the foregoing is that recoverable damages were shown in this case and should have been properly found in appellant's favor as follows: $267 for loss on the saloon fixtures; $150 for loss on the matting; $154.80 for loss on the glassware; $111 for loss on the gas fixtures, and $50 for expenses; in all $732.80, and interest thereon from the time of the breach, April 1, 1901. Interest is allowable as part of the damages and necessary to fully indemnify appellant for the result of respondent's wrongful conduct. *J. I. Case Plow Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568; *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in favor of the appellant in accordance with this opinion.

LATHROP, Appellant, vs. HUMBLE, Respondent.

December 16, 1903—January 12, 1904.

Sale of chattels: Varying written instrument by parol: Consideration: Appeal: Bill of exceptions: Certificate: Pleading: Practice.

1. In an action of replevin to recover two horses, the plaintiff offered evidence tending to prove that he had negotiated a purchase of defendant's farm, horses, cows, etc.; that a written executory contract was signed, which however did not include the horses and cows; that plaintiff was misled into not discovering the omission until the next day when the parties were about to make conveyance and payment; that thereupon plaintiff called defendant's attention to the omission; that defendant then said the horses and cows went with the farm; and that plaintiff thereupon paid the price agreed upon and defendant executed a deed of the farm which recited only that it also conveyed the property mentioned in the executory written agreement. Defendant, however, with the other property delivered to the plaintiff possession of the horses and cows, but about two weeks later came and took away the horses in question. *Held:*

   (1) That the evidence should have been admitted, since it tended to prove an executed transfer of the horses on the day the deed was delivered, and the deed, in its very nature, was not an attempted expression of the whole contract, but the execution of the whole or a part of the defendant's side thereof.

   (2) That plaintiff's claim that the written executory agreement was not in accordance with the oral understanding was a sufficient consideration to support the transfer of the articles not mentioned therein.

2. The absence of a certificate that the bill of exceptions contains all the evidence does not prevent a review of the judgment by the supreme court, but merely precludes that court from examining any assignments of error which are predicated upon a disregard of the evidence, such as the directing, or refusing to direct, a verdict, and the like.

3. A complaint did not contain a prayer for relief, but the objection on that ground was raised for the first time on the trial and overruled, and judgment rendered for the defendant on other grounds. *Held*, that the judgment would not be affirmed for the error of the trial court, if any, in overruling such objection, if other errors in the record necessitated a reversal.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action of replevin for two horses and certain other property. Plaintiff's right to recovery, aside from the horses, was conceded, but verdict for the defendant directed as to the horses. Plaintiff offered to prove that he negotiated a purchase from the defendant of his farm, these horses, some cows, and certain other personal property; that on January 14th, prior to the consummation of said purchase, a written contract was signed, purporting to express an executory agreement for a sale of the farm and certain specified personal property at an agreed price of $5,200, not including, however, the horses and cows; that plaintiff was misled into not discovering that omission until the next day, January 15th, when the parties were about to make conveyance and payment, whereupon he called the defendant's attention to it, and the defendant said that was all right, that the horses and cows went with the farm, whereupon the plaintiff paid the stipulated price, and the defendant executed a deed of the farm, which recited only that it also conveyed the property expressed in the agreement of the previous day, but, at the same time with the other property, defendant delivered to the plaintiff the horses and cows, but, after a lapse of some two weeks, came and took away the horses mentioned in the complaint. All this evidence was excluded upon the ground that it varied the written instruments. A bill of exceptions was settled, showing these offers of evidence and exceptions to the ruling against the same, but not certified to contain all the evidence. From judgment in accordance with the verdict so ordered, plaintiff appeals.

For the appellant there were briefs by *Weed & Van Doren,* and oral argument by *R. N. Van Doren.*

For the respondent the cause was submitted on the brief of *A. M. Spencer.*

DODGE, J. The evidence offered and excluded at least tended to prove an executed transfer of the replevied horses, made on the day that the deed of the farm was executed. No reason is apparent why plaintiff might not prove that fact by parol evidence. The statute of frauds offered no obstacle, for a delivery of property and payment of consideration were offered to be proved. The fact that, as a part of the same transaction, there was executed a deed which recited that, for the whole consideration paid, the defendant conveyed other property, presented no obstacle. Such deed, in its very nature, was not an attempted expression of the whole contract; it was but the execution of the whole or a part of the defendant's side thereof. *Cuddy v. Foreman*, 107 Wis. 519, 83 N. W. 1103; *Brader v. Brader*, 110 Wis. 423, 432, 85 N. W. 681. Indeed, it is in no wise inconsistent with a deed which recites that, for a money consideration named, certain property is thereby conveyed, that for the same consideration other property is also conveyed. A gross sum of $5,000 may buy several tracts of land or articles of personal property, and separate conveyances of every parcel be made, each reciting such sum as its consideration, and present no inconsistency, for the gross payment would be the true consideration for each conveyance. For another reason the fact that a deed was made reciting as its consideration the entire payment made would be no obstacle to prove that at the same time defendant made an executed transfer of other property, for such transfer would be valid even if there were no consideration for it. Plaintiff's claim that title to these horses was transferred to him on January 15th by the defendant would not be invalidated by the fact that he paid nothing for such transfer. It was entirely competent for the defendant to make over such horses to him as a free gift or in consideration of some claim made by plaintiff that he was equitably entitled thereto by virtue of the prior transactions,

whether such claim had any validity or not. The evidence offered as to the transactions on the previous day at least tended to prove a claim on plaintiff's part that defendant had acted unfairly with him in omitting from the written executory agreement this property, which both parties had understood was to be included therein. Whether he could have proved such facts to effectively modify or defeat the written agreement made on the 14th was not material. The mere claim that such writing was not in accordance with his understanding, of itself constituted a reason and a sufficient consideration for defendant to make transfer of these articles of property not included therein. Conceding, therefore, that plaintiff could not have been permitted to show by parol that the executory writing of January 14th did not correctly express the agreement then made by the parties (*John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337) for the purpose of affecting the validity of that agreement, he could show the situation and the claims of the respective parties for the purpose of establishing the meeting of their minds on January 15th as to the transfer of the property in controversy. The conclusion is irresistible that the court erred in excluding the testimony offered by plaintiff to prove the transfer to him of these horses. Whether there may have been some portions of that testimony objectionable as irrelevant or immaterial on other grounds, need not, for the purposes of this appeal, be considered. Generically, the testimony was admissible, and its exclusion was error.

But here the defendant makes contention that, because the bill of exceptions is not certified to contain all the evidence, we cannot review the judgment. This is an entirely mistaken view. The absence of such certificate goes no further than to preclude us from examining any errors which are predicated upon disregard of the evidence, such as the directing, or refusing to direct, a verdict, and the like. When the bill of exceptions discloses palpable and distinct error, the

judgment must be reversed unless the record makes reasonably certain the absence of any prejudice from that error. Enough appears in the bill of exceptions in this case to show that the rejection of the evidence in question was directly material to the conclusion reached by the court, and the absence of assurance that we have all the evidence before us makes it impossible to say from the bill of exceptions that the error committed was nonprejudicial. Review of specific errors, although the bill of exceptions did not contain all the evidence, has always been customary. *Hamlin v. Spaulding,* 27 Wis. 360; *Roberts v. McGrath,* 38 Wis. 52; *Humphrey v. Taylor,* 45 Wis. 251; *Nass v. Schulz,* 105 Wis. 146, 81 N. W. 133; *McAllister v. State,* 112 Wis. 496, 88 N. W. 212.

Defendant now interposes another obstacle to plaintiff's recovery, in that his amended complaint contains no prayer for judgment. The action having been commenced in justices' court upon the statutory affidavit in replevin, when it reached circuit court a formal complaint was filed, setting forth the necessary facts, but containing no prayer for relief. Defendant did not demur to the complaint, but answered. At the trial, however, he interposed an objection to any evidence because of the insufficiency of the complaint. That motion was overruled. Doubtless, the failure of complaint to declare the relief demanded renders it defective. Sec. 2646, Stats. 1898. Whether, however, it can be said to fail to state facts necessary to constitute the cause of action, so as to be obnoxious to a general demurrer, or whether the defect should be reached by a motion to strike out or a motion to make specific, may perhaps be doubted. Indeed, there seem to be decided cases indicating that any of these methods may be pursued. The defect, however, is not one of which the defendant can avail himself at this time. The trial court overruled his objection in the nature of a demurrer *ore tenus,* and received evidence. If the objections had been sustained, the trial court would of course have given plaintiff an oppor-

tunity to amend. It would be distinctly perversive of justice to hold that such defect should now be made reason for affirming a judgment against the plaintiff when he has had no such opportunity. If it were conceded that the court below erred in overruling this objection, it would not be an error which would justify the affirmance of his judgment notwithstanding the error committed against plaintiff. It would at most warrant a new trial, with opportunity to amend.

By the Court.—Judgment reversed, and cause remanded for new trial.

FOSHA, Respondent, vs. O'DONNELL, imp., Appellant.

December 16, 1903—January 12, 1904.

Written instruments: Ambiguity: Parol evidence: Statute of frauds: Assumption of debt as part of consideration: Evidence: Immaterial error: Attorney and client: Conversations in absence of client: Accord and satisfaction: Authority to bind client: Ratification: Tender back of amount received: Instructions to jury: Judgment.

1. Where one person, on purchasing property of another, agrees to apply the consideration in part payment of the debts of the latter, but the written memorandum fails to fully specify all the stipulations made as to the debts assumed, it may be shown by parol testimony what debts the purchaser agreed to pay.
2. An agreement by one person to pay certain debts of another as the consideration for the transfer of property to him by the latter is not in the nature of a special promise to answer for the debt, miscarriage, or default of another, and need not be in writing.
3. Error in refusing to admit evidence is cured by subsequent admission of the evidence.
4. Evidence of interviews between the attorneys who acted for plaintiff and defendant in a former suit between them, in which it was claimed the matter in controversy in the present action was compromised, which did not take place in the presence of plaintiff or her agents and were not shown to have related to matters within the authority of plaintiff's attorney, is *held* to have been properly excluded on plaintiff's objection.

5. An attorney can bind his client in an attempted accord and satisfaction only upon an express authorization.
6. An attorney made an accord and satisfaction of several notes of his client without express authority, and neither the client nor her agents had knowledge of its terms when the proceeds were turned over to her, but supposed the amount received to have been taken in satisfaction of one note only, and, upon notice of the payor's claim that the settlement included all the notes, the client promptly disavowed the attorney's acts. *Held*, that retention of the amount so paid, and failure to tender repayment upon discovery of the payor's claim, did not constitute an affirmance of the attorney's acts or a ratification of the accord and satisfaction.
7. Specific error for failure to instruct on the questions at issue can be assigned only upon refusal to give an instruction formally requested in writing.
8. Plaintiff, the owner of three notes which defendant had assumed and agreed to pay, commenced an action upon the first note, which action was dismissed by stipulation, entered into, however, by plaintiff's attorney without authority, in consideration of payment to plaintiff of a sum less than the amount due on the note in suit, defendant believing the stipulation to be an accord and satisfaction of plaintiff's claim against him upon all three of the notes, and plaintiff receiving and retaining said sum upon the belief that it was in satisfaction of the note in suit only. Plaintiff subsequently brought an action on the other two notes and recovered judgment. *Held*, that the court should apply the amount paid under the supposed accord and satisfaction in part satisfaction of plaintiff's demand.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Modified and affirmed.*

This is an action to recover on two promissory notes executed by the defendant Prosser to the plaintiff, one for $200 and the other for $245, both bearing date of August 19, 1891. The notes were given as a part of the purchase price of a lot in the city of Antigo. At the time of the execution of the notes respondent executed a land contract whereby she agreed upon the payment of the notes to convey the land to J. W. Prosser, one of the defendants. Prosser took possession of the premises and occupied them for a livery business.

In the month of March, 1893, the defendant *O'Donnell* purchased, for a consideration of $2,000, a one-half interest in the livery business and property, including the real estate. $1,625 was to be applied on other debts of Prosser and the balance on these notes. At this time there were three notes due respondent from J. W. Prosser. On the 21st of September, 1893, the partnership between Prosser and *O'Donnell* was dissolved, *O'Donnell* purchasing the whole business, including the lot purchased from respondent. Respondent brought action on one note for $200 against Prosser and *O'Donnell,* January 14, 1896, in the municipal court of Langlade county, and recovered judgment therein. An appeal was taken to the circuit court, where while the suit was pending the following stipulation was made:

"It is hereby stipulated by and between the plaintiff and the defendant, *Timothy O'Donnell,* that in the consideration of the payment of seventy-five dollars ($75.00) and the disbursements of the action by the said defendant, *Timothy O'Donnell,* that this case is hereby settled and dismissed as to the said *Timothy O'Donnell,* defendant, and without prejudice to the plaintiff to enter judgment against the defendant, J. W. Prosser, the action not being dismissed as against him. It is also understood and agreed and stipulated that in consideration of said settlement by said *Timothy O'Donnell,* defendant, that the plaintiff, *Kate Fosha,* waives all other and further claims she may have against the said *Timothy O'Donnell* but without prejudice to the plaintiff as to any further claims of any nature she may have against the defendant, J. W. Prosser.

"Dated this 23rd day of August, A. D. 1899.

"J. H. TREVER, Attorney for Plaintiff.
"T. W. HOGAN, Attorney for Defendant, *Timothy O'Donnell.*"

The $75 was paid by appellant *O'Donnell* and was received by respondent from her agent, Mitchell, who received it through her attorney. She still has the same in her possession.

Respondent asserts that she had no personal knowledge or information of the contents of the stipulation, and understood it was to settle no more than the note then in litigation, and asserts that she was so informed by her attorney who signed it for her.

The jury found that appellant agreed to pay the notes in question as part of the consideration of the purchase price of the partnership business from Prosser; that respondent and her agent, Mitchell, had not authorized Trever, her attorney, to sign the stipulation of settlement in the case then pending between her and appellant; and that she had no knowledge of the contents of the written stipulation when the money was paid thereon.

It appeared by the evidence that respondent and her agent understood that the stipulation covered no more than the matters in controversy in that suit, and that they treated the stipulation as payment only of the note and the disbursements in that action. During the pendency of this action she had denied that she authorized it to be made to the effect alleged and claimed by defendant in his answer.

The court awarded judgment on the special verdict in respondent's favor for the amount of the note. This is an appeal from that judgment.

For the appellant there was a brief by *T. W. Hogan* and *W. F. White,* and oral argument by *Mr. Hogan.*

For the respondent there was a brief by *Foster & Morson,* and oral argument by *O. H. Foster.*

SIEBECKER, J. The cause of action set out in the complaint is to recover on two promissory notes against defendant Prosser as the maker, and against the defendant *O'Donnell* upon the ground that he agreed to pay them out of the money due Prosser from him. The defendant *O'Donnell* defends upon two grounds: (1) That he at no time agreed to pay his debt to Prosser by paying these notes held by plaint-

iff; and (2) that whatever claim plaintiff may have had against him was fully compromised and paid under written settlement between them in a former action brought on another note arising out of the same transaction.

One of the issues was whether the defendant *O'Donnell,* in purchasing the interest of Prosser's livery business in March and September, 1893, agreed to apply the consideration ($2,000) paid by him in discharge of Prosser's liabilities on these notes held by plaintiff. The written memorandum of the agreement between the defendant *O'Donnell* and Prosser did not fully specify all the stipulations made as to what debts *O'Donnell* agreed to pay out of the moneys due Prosser for the sale of the livery business and stock. It was therefore proper to receive oral testimony to ascertain what debts the defendant *O'Donnell* had agreed to pay. This in no wise contradicted the written agreements between the defendants embodying a part of the transaction of the purchase of the livery property and the application of the consideration to the payment of Prosser's debts. *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Cuddy v. Foreman,* 107 Wis. 519, 83 N. W. 1103.

It is further asserted that if such was the understanding it was a promise to answer for the debt, default, or miscarriage of another, and is therefore void, because not in writing, expressing the consideration, and subscribed by the party to be charged. The effect of the transaction was that the defendant *O'Donnell* agreed to pay his debt to Prosser, by assuming, with respondent's assent, the payment of these notes due her. Such an agreement it is held is not in effect an undertaking in the nature of a "special promise to answer for the debt, miscarriage or default of other persons," though it is collateral to the liability of the original debtor to pay the same debts. The agreement is not a mere promise to answer for another's liability contemplated by the statutes requiring such agreements to be in writing, expressing

the consideration, and signed by the party sought to be charged. It is an agreement that the defendant *O'Donnell* will pay his debt to Prosser in a particular manner, by discharging these notes held by plaintiff, based upon the consideration between him and Prosser at the time the agreement was made. When this promise was accepted by plaintiff the liability was established, and she could maintain her action against him alone or she might join Prosser with him as defendant. *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275, 72 N. W. 872; *Putney v. Farnham,* 27 Wis. 187, and cases cited; *Hoile v. Bailey,* 58 Wis. 434, 17 N. W. 322.

The action of the trial court was proper as regards the questions presented upon the first three grounds assigned as error.

Error is specifically assigned upon several rulings of the court in admitting testimony tending to show that *O'Donnell* agreed to pay the notes out of his debt to Prosser arising from the purchase of the livery business and property, including the lots sold to him by plaintiff under the land contract. As above stated, whether such an agreement had been made was an issue, and, since the agreements relating thereto were not all reduced to writing, it was proper to receive oral testimony to show the part which defendant *O'Donnell* had agreed to pay. The testimony objected to came within this class, and was properly admitted by the court.

Questions put to defendant while on the stand for the evident purpose of giving him an opportunity to deny making any agreement to pay these notes were excluded by the court, and exceptions taken. It appears that the court reversed its own ruling on this question, and thus any error it committed in this respect was corrected by permitting him to state fully his denial and explanation of the transaction by which it is claimed he promised or agreed to pay these notes.

Complaint is made that appellant was prejudiced upon the trial by excluding the testimony of defendant's attorney, Mr.

Hogan. This testimony related to interviews between him and plaintiff's attorney respecting the settlement of the action between the parties. Upon examination of the record it appears that the trial court properly excluded the evidence upon the ground that the interviews were in the absence of plaintiff and her agents, and for the further reason that nothing appeared to show that the inquiry related to matters within the authority of her attorney. Nor were appellant's rights affected by the action of the court in refusing to admit in evidence the records and file of the former suit, when first offered, since the court received them in evidence before the defendant rested his case. We cannot perceive that this was prejudicial in any respect.

It is contended the court erred in refusing to submit the special verdict requested, in the form the verdict was submitted, in the instructions given, and in omitting to instruct upon certain phases of the case. The errors assigned upon these grounds relate to the second defense above mentioned, namely, that there was an accord and satisfaction of the cause of action alleged by the plaintiff. The plaintiff stands before the court as denying the settlement alleged to have been made by her attorney, asserting that it was made without authority; that the payment of $75 to her attorney was received by her without knowledge of its terms, and upon the representations and the understanding that it was in satisfaction and settlement of the claims involved in that action; and that she was not informed that this accord and satisfaction was claimed to include the notes in question until the defendant so alleged in his answer in this action.

Plaintiff's attorney had no authority under his retainer to bind his client in an attempted accord and satisfaction; he can exercise such a power only upon an express authority. *Mallory v. Mariner,* 15 Wis. 172; *Kelly v. Wright,* 65 Wis. 236, 26 N. W. 610; *Mygatt v. Tarbell,* 85 Wis. 457, 55 N. W. 1031. It therefore devolved upon appellant to estab-

lish that Trever, respondent's attorney, had been given express authority to make this settlement, or, if he had no such authority when it was made, that respondent had ratified it. Upon the first question the evidence of respondent and her agents was positive that no such authority was given. The attorney who was called as a witness by appellant declared that he had conferred with her agents and consulted them as to what conditions were in the settlement before it was executed by him. Upon this state of the proof the court submitted this issue to the jury in the special verdict. The jury found that respondent's attorney had not been authorized to make the settlement embodied in the written stipulation, and that neither she nor her agents had knowledge of its terms and conditions when the $75 was paid her. The respondent at no time tendered repayment of the $75 so received. It is contended that this constitutes an affirmance of her attorney's acts, and thereby ratifies the settlement as an accord and satisfaction of the notes in question. We cannot assent to this claim in view of the situation of the parties under the facts and circumstances of the case. That respondent stood in the attitude of repudiating the settlement is manifested by her course in commencing this action on the notes and by offering to litigate the question upon the trial. She had a right to a trial of the issue in this case, whether the alleged settlement included these notes. Her position in the action was positive notice to appellant that she controverted his defense of an accord and satisfaction. The stipulation was not so plain and clear on its face as to preclude all inquiry into the situation of the parties and the circumstances under which it was made, for the purpose of aiding the court to determine, in the light thereof, whether the parties making it intended it should be deemed an accord and satisfaction of the notes sued upon. This cast the burden on appellant of establishing the fact that she ratified the acts of her attorney, and thus was bound by the stipulation.

Considering the evidence, aside from her failure to tender back the $75, it appears that she promptly and actively declared her nonassent and condemnation of the unauthorized acts of her attorney. Appellant's affirmance of the settlement in this action precluded him from voluntarily taking back the money, and compelled him to refuse it if tendered. Respondent's claim that the stipulation and payment under it was a settlement only of the note sued on in that action entitled her to hold the money until that question was determined upon the trial of this case, and she was not, therefore, called upon to restore the amount so paid her until the court found and determined she had in fact not ratified the accord and satisfaction. We are led to the conclusion that respondent's conduct and acts from the time she was notified of appellant's claim as to the settlement do not constitute a ratification of the unauthorized accord and satisfaction which her attorney attempted to make for her. Mechem, Agency, § 153; *Mobile & M. R. Co. v. Jay,* 65 Ala. 113; *Ætna Ins. Co. v. Northwestern I. Co.* 21 Wis. 458; *Wheeler v. Northwestern S. Co.* 39 Fed. 347; *Waite v. Vose,* 62 Me. 188; *Owings v. Hull,* 9 Pet. 607; *Thacher v. Pray,* 113 Mass. 291; *Lester v. Kinne,* 37 Conn. 9.

The facts established by the evidence were sufficiently clear to justify the jury in answering the special questions covering this issue in the negative. Nor is error shown to have been committed in framing the verdict or in the instructions given by the court.

Error is assigned upon the ground that the court failed to give any instructions upon the burden of proof as to the questions litigated. No specific instructions were requested either in writing or orally. "Specific error can be assigned only upon refusal to give an instruction formally requested in writing." *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249, and cases cited.

Under the peculiar circumstances of the case the question

arises, Was appellant entitled to a direction that respondent make restitution of the $75 paid by him under the stipulation, or should the court; in view of the fact that respondent was entitled to judgment for the amount of the notes, direct that it be applied in part satisfaction of this demand? The fact appears, as found by the jury, that a liability existed in respondent's favor upon these notes. Appellant, who must be presumed to be solvent, paid this sum to respondent with intent to discharge this liability in full under the stipulation of settlement. We do not perceive how the application of this sum in part payment to the same debt could be unjust to appellant, nor is there anything in respondent's conduct which should prevent such an application from being made. She in no way misled appellant to make this payment, but in good faith received the money to be applied on his debt. She should not, therefore, be estopped from receiving what, in the light of the circumstances and relation of the parties, can in equity be awarded her. Under the circumstances we think the sum of $75 in respondent's hands should be applied in part payment of the judgment recovered by her for the amount of the notes. *Friend Bros. C. Co. v. Hulbert,* 98 Wis. 183, 73 N. W. 784; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Gates v. Raymond,* 106 Wis. 657, 82 N. W. 530; *Nye v. Swan,* 49 Minn. 431, 52 N. W. 39.

The judgment should be modified, directing the application of the $75 as part payment of the amount recovered.

By the Court.—The judgment is modified by reducing the damages to $776.33, and the total to $831.48, and as so modified the judgment is affirmed; the appellant to recover costs in this court.

LONGSTAFF, Plaintiff in error, vs. THE STATE, Defendant in error.

December 16, 1903—January 12, 1904.

Habeas corpus: *Jurisdiction of court commissioner: Review: Practice: Motion: Questions reviewed on* certiorari: *Writ of error.*

1. Sec. 23, art. VII, Const., provides that court commissioners may be vested with "such judicial powers" as are "prescribed by law," not exceeding the powers "of a judge of a circuit court at chambers," and sec. 2815, Stats. 1898, prescribes that a court commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers, in all actions or proceedings in courts of record. *Held*, that a court commissioner has jurisdiction upon *habeas corpus* to hear and determine whether a person, held for trial on a criminal offense punishable by imprisonment in the state prison, is imprisoned contrary to law.
2. The action of a court commissioner in discharging on *habeas corpus* a person held for trial on a criminal charge punishable by imprisonment in the state prison may be reviewed upon proper proceeding by the circuit court.
3. In such case, a motion made in the ordinary way is a proper proceeding.
4. Where a court commissioner has jurisdiction of the subject matter on *habeas corpus* to test the validity of the imprisonment of one held for trial on a criminal charge, errors the commissioner may have committed in deciding any question of law or fact cannot be reviewed by the circuit court on *certiorari.*
5. In such case, where the circuit court has improperly reversed the order of the court commissioner for errors of judgment in determining the case upon the merits, the error of the circuit court is properly reviewable on writ cf error.

ERROR to reverse a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

It appears from the record, and is undisputed, that February 17, 1903, a complaint was made to the municipal judge of Chippewa county, charging the plaintiff in error with a criminal offense therein described, punishable by im-

prisonment in the state prison. The municipal judge thereupon issued a warrant upon which the accused was arrested and brought before the municipal court, and after a preliminary examination was held to bail for his appearance at the circuit court, and, in default of the requisite bail, was committed to the county jail. February 21, 1903, upon the verified petition of the accused, setting forth all the evidence and proceedings before the committing magistrate, the accused procured from Hon. Arthur Gough, court commissioner for Chippewa county, a writ of *habeas corpus,* returnable before him February 24, 1903, at 2 p. m., at the office of said commissioner, and which writ was on February 21, 1903, duly served on the sheriff as required by sec. 3416, Stats. 1898, and his fees for bringing up the prisoner were then and there paid; that at the same time, and on February 21, 1903, a notice in writing of such hearing was given to the district attorney. February 24, 1903, the sheriff having the custody of the accused made return to such writ, and the accused at the same time traversed such return. Thereupon, and after full hearing, the said court commissioner by a written order discharged the prisoner from further custody by the sheriff. Upon the petition of the district attorney duly verified March 21, 1903, a writ of *certiorari* was duly issued from the circuit court of Chippewa county to Hon. Arthur Gough, court commissioner, requiring him to certify and return to the circuit court such writ, together with all the files, papers, and entries recorded, filed, or used in the proceedings in such matter. March 30, 1903, Commissioner Gough duly made such return. April 14, 1903, the circuit court determined and adjudged that said order of the court commissioner be reversed and annulled, and the accused was thereby remanded to the custody of the sheriff, to be detained by him as in the commitment required. To reverse that judgment the accused, on April 18, 1903, sued out this writ of error.

The cause was submitted for the plaintiff in error on the

briefs of *W. H. Stafford,* and for the defendant in error on that of the *Attorney General* and *W. D. Corrigan,* second assistant attorney general.

CASSODAY, C. J. Court commissioners may be vested with "such judicial powers" as are "prescribed by law," not exceeding the powers "of a judge of a circuit court at chambers." Sec. 23, art. VII, Const.; *Faust v. State,* 45 Wis. 273, 276; *Wis. Ind. School v. Clark Co.* 103 Wis. 662, 663, 79 N. W. 422. The statute provides that, except as therein otherwise provided, a

"judge or commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers, according to existing practice and these statutes, in all actions or proceedings in courts of record, but all such orders may be reviewed by the court." Sec. 2815, Stats. 1898.

Upon the facts stated, there can be no question but what the court commissioner had jurisdiction upon *habeas corpus* to hear and determine whether the accused was imprisoned contrary to law. Whether such determination was rightful is another question. If the state deemed such determination wrongful, then the order of the court commissioner discharging the accused in the case at bar was undoubtedly reviewable upon the merits in a proper proceeding by the circuit court. *In re Hammer,* 113 Wis. 96, 89 N. W. 111. A motion made in the ordinary way has recently been held by this court to be such proper proceeding. Id.; *State ex rel. Gaster v. Whitcher,* 117 Wis. 668, 94 N. W. 787, 789. No such motion was here made. On the contrary, the attempt was here made to review the order upon the merits upon the return to the writ of *certiorari.* As said in the case last cited, when a writ of *certiorari* "is used as the foundation for jurisdiction to bring up and decide upon the validity of a judicial determination by any body or officer, jurisdictional questions only are reached, and such questions pertaining to the de-

termination made by the officer or body particularly complained of." *State ex rel. Gaster v. Whitcher,* 117 Wis. 672, 94 N. W. 788. The writ of *certiorari,* when used to test the validity of some judicial or *quasi*-judicial proceeding, as here, only reaches jurisdictional errors. Id. Since the commissioner had jurisdiction of the subject-matter on *habeas corpus,* any errors he may have committed in deciding any question of law or fact could not be reviewed by the circuit court on writ of *certiorari.* This being so, it is obvious that the circuit court improperly reversed the order of the court commissioner for errors of judgment in determining the case upon the merits. Such error of the circuit court is properly reviewable by this court on this writ of error. Sec. 3043, Stats. 1898.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to affirm the order of the court commissioner.

BROWN and another, Appellants, vs. GATES, Respondent.
SAME, Respondents, vs. SAME, Appellant.

October 27, 1903—February 2, 1904.

Bills and notes: Place of contract: Presumptions: Executory contracts made on Sunday.

1. G. living in Wisconsin and B. living in Massachusetts, met by agreement in New York city relative to a sale of B.'s lands situated in Florida. At that time and place G., B. and the purchaser had negotiations relative to the sale of the lands on Saturday which were consummated on the following Monday. On the intervening Sunday there was made, executed and delivered to B. the promissory notes of G., made payable in Massachusetts. *Held,* that the place of the contract was the state of Massachusetts, and its laws, making void all executory contracts for the payment of money, including promissory notes, made and delivered on Sunday, governed.

2. Where the place of performance of a contract is expressed, the presumption is that the parties contracted with reference to the law of that place.
3. Where a contract is made in one state or country, to be performed in another state or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation and effect, unless it clearly appears that the parties intended the contract should be governed by the law of the place where it was made.

APPEALS from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed on defendant's appeal.*

This action is brought by plaintiffs as co-partners to recover on two notes made by defendant, each of $5,000, with interest, dated January 12, 1895, payable to plaintiffs, or order, on or before eighteen months after date at their office in Boston, Massachusetts. The defendant admits the making of the notes, and that there was a manual tradition of the same. He avers, however, that the notes were in fact made, executed, and delivered on Sunday, January 13, 1895, under a parol agreement whereby it was understood that the notes were to have no validity until he realized in cash on his interest in the lands which were the subject-matter of the transactions through which the notes came into existence. The action was tried before a jury, which rendered a special verdict on the disputed facts in the case. The undisputed facts in the case are that plaintiffs at the date of the notes were the owners of a large tract of Florida land, for which defendant procured one John Paul as prospective purchaser before these notes were made. On January 10, 1895, plaintiff *Brown* and defendant met, pursuant to an arrangement, at a hotel in the city of New York, with the view of consummating a sale of these lands to John Paul, who met with them on the following day. The negotiations resulted in an agreement that Paul should purchase the lands. This agreement was reached on Saturday, January 12th, and consummated on the fol-

lowing Monday. It is averred that it was a condition of this transfer to Mr. Paul that the defendant should retain a one sixth interest in the lands. It is not disputed but that *Brown* and defendant, made some arrangements pertaining to this transaction, resulting in the notes in question being made on Sunday, January 13th. Among other facts the jury found that the notes were delivered to *Brown* for plaintiffs in the city of New York on this Sunday. Upon the verdict, judgment was rendered in plaintiffs' favor for the full amount, with costs, with some condition as to its enforcement. From this judgment both parties appeal.

For the plaintiffs there were briefs by *Sylvester, Scheiber & Orth,* and oral argument by *Fred Scheiber* and *C. A. Orth.*

Rublee A. Cole, for the defendant.

The following opinion was filed November 17, 1903:

SIEBECKER, J. The defendant avers that the notes sued on by plaintiffs were executed and delivered on Sunday, and are therefore void in law. As stated, there is no dispute but that the notes were signed by defendant on Sunday, January 13, 1895. The jury found they were delivered to plaintiffs on the same day. For this reason defendant contends they are void in plaintiffs' hands. Courts have refused to maintain actions on contracts when made in violation of statutes for the observance of Sunday, and have declared them void as between the parties. *Hill v. Sherwood,* 3 Wis. 343; *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Ainsworth v. Williams,* 111 Wis. 17, 86 N. W. 551; *Cranson v. Goss,* 107 Mass. 439. The question, then, arises, Were these notes made in violation of the law which prohibits the making of such contracts on Sunday? This presents an inquiry as to the place of contract of these notes. It is the general rule at common law that personal contracts are to be deemed contracts of the state or country where they are actually made.

A well-established exception occurs, however, when a contract declares specifically, or it appears by implication, that it is to be performed or paid in another state or country. Then its validity, nature, obligation, and effect is to be governed by the law of the place of payment or performance. The grounds of this exception are that the presumed intention of the parties is that it shall be deemed to be a contract of the place of payment or performance, unless such presumption is rebutted by the facts and circumstances surrounding the making and the performance or payment. Under such circumstances the fact that notes are made payable at the place of the domicile of the payee is held to be very persuasive evidence of the intention of the parties that it was to be a contract of the place of payment. The intention thus expressed has been commonly held so conclusive in its effect that it must prevail unless it is made to appear that it would invalidate the contract, and that the parties intended to avoid such a result. Of the many authorities in support of these principles, the following may be cited: *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Shores L. Co. v. Stitt,* 102 Wis. 450, 78 N. W. 562; *Hill v. Spear,* 50 N. H. 253; *Sondheim v. Gilbert,* 117 Ind. 71, 18 N. E. 687; *Dickinson v. Edwards,* 77 N. Y. 573, 33 Am. Rep. 671; Story, Conflict of Laws, §§ 278*a,* 280; 1 Daniel, Neg. Inst. § 865; Wood's Byles, Bills & Notes, 570. This conclusion in no way militates against the decision of this court in *Newman v. Kershaw,* 10 Wis. 333. In that case it was held that the place of payment as evidence of the intention of the parties that the law of that place is to govern was overcome by the actual facts and circumstances of the case. An examination of the case will show a marked difference in the facts of the two cases. In the instant case we have an incidental meeting of the maker and payee of the notes in the city of New York, one of whom is domiciled in Massachusetts and the other in Wisconsin; the subject-matter of the contract out of which

these notes arose being a sale and transfer of real estate situated in the state of Florida. No money was received or paid by either at the time the notes were executed. All further acts or dealings required by the contracts were to be performed in the state of Massachusetts. From these facts the conclusion must follow that the place of the contract is the state of Massachusetts, and its laws govern. By the law of Massachusetts all executory contracts for the payment of money, including bonds and promissory notes, made and delivered on Sunday, are void as between the parties. Supp. Pub. St. Mass. 1889–1895; *Cranson v. Goss,* 107 Mass. 439, and cases cited; *Comm. v. De Voe,* 159 Mass. 101, 34 N. E. 85. Defendant's contention concerning the jurisdiction of the court under the legislation embodied in chs. 1 and 446, Laws of 1903, need not be considered for the reason that, if this legislation be invalid as claimed, the case must be held as pending in the superior court, and, on the other hand, if valid, the provisions of these acts cover this case, and the court properly proceeded to a final determination of the cause. From the foregoing it follows that the judgment must be reversed, and the action be dismissed. No necessity, therefore, arises for considering any of the other questions argued on the appeal of either the plaintiffs or defendant.

By the Court.—Judgment of the superior court is reversed on defendant's appeal, and the cause is remanded, with directions to enter judgment dismissing the complaint. Plaintiffs to take nothing on their appeal.

Plaintiffs moved for a rehearing.

The following opinion was filed February 2, 1904:

SIEBECKER, J. A rehearing is asked in this case upon the grounds: (1) That the court mistook what are the undisputed facts of the case; and (2) that the decision is con-

trary to the established rule of law as recognized in the case of *Seamans v. Knapp-Stout & Co. Co.* reported in 89 Wis. 171, 61 N. W. 757.

It is insisted that the statements in the opinion referring to the time and place of meeting as incidental to the main objects of the transaction, and that "all further acts or dealings [after delivery] required by the contracts were to be performed in the state of Massachusetts," are erroneous. It is claimed that these assertions are refuted by the facts, in that such meeting was pursuant to an arrangement between the parties, and that the negotiations covering the transaction were in fact consummated on Monday succeeding the Sunday when the notes were executed and delivered. This contention is based on a misconception of the main purposes and objects of the parties. It is obvious that the place of meeting was a mere incident to the transaction, and was at a place which incidentally happened to be convenient to all. If circumstances had favored another place and state for such meeting, no doubt such place would have been selected. The claim that the court erroneously assumed that "all further acts or dealings required by the contracts were to be performed in the state of Massachusetts" misinterprets the terms of the decision, by applying this assumption to the transactions of the sale and conveyance of the lands, instead of restricting it to the notes, the only contracts involved in this suit. Under the facts, there is no room for question on this subject. The undisputed facts and the finding of the jury show that the notes were made, executed, and delivered on Sunday; that plaintiffs had possession of them from that day; and that the only necessary step for full performance of the contracts evidenced by these notes, and expressed on their face, was payment at the time and place specified, namely, the plaintiffs' office, in the city of Boston, Massachusetts.

It is strenuously insisted that the decision is in conflict with the law as announced in *Seamans v. Knapp-Stout & Co. Co. supra,* and contrary to the weight of adjudications. After a re-examination of the *Seamans* as well as the present case, we are reassured in the opinion that the ruling is in accord with the cases brought to our attention, and must stand as established by these and other cases. The *Seamans Case* presented a dispute between an insurance company of this state and the assured residing here, concerning insurance contracts negotiated by foreign agents to insure property without this state. The question litigated was whether the contracts were in fact made within this state or not. It was determined before the trial court that the contracts were made and delivered in this state, where the parties resided, and where the contracts were to be performed and sought to be enforced. The question of the validity of a contract made in one state or country, to be performed in another, did not arise, and consequently was not decided. It is, however, claimed that the court, in its opinion, adopted the rule expressed in the excerpt from the opinion in the case of *Scudder v. Union Nat. Bank,* 91 U. S. 406, when it declared:

"Much of the seeming conflict in the adjudications upon the subject of *lex loci contractus* will disappear by carefully discriminating as to the precise nature of the issues and matter under consideration. Thus it has been held by the supreme court of the United States that matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought."

Much stress is laid in argument on the point that this is the only authoritative declaration by this court on the subject, and that it conflicts with the doctrine in the present

case. The cases in this court do not sustain this contention. In *Fisher v. Otis,* 3 Pin. 78, this court, speaking on the subject, say:

"The general rule unquestionably is that the *lex loci contractus* controls the nature, construction, and validity of the contract. . . . From this rule, however, contracts made in one country, but to be performed in another, have very generally been excepted. And the reason of the exception is that the parties are supposed to intend to be governed by the laws of the country where their contract is to be performed or to take effect."

This rule is recognized as the established law in *Newman v. Kershaw,* 10 Wis. 333, as well as *Shores L. Co. v. Stitt,* 102 Wis. 450, 78 N. W. 562; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703, and *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664. In *Bartlett v. Collins,* this question was particularly considered and decided as a question necessarily involved in the case. It is there stated:

"As a general rule, the construction and validity of a purely personal contract depends on the law of the place where made. Story, Conflict of Laws. If, however, the contract is made in one place, to be performed in another, then, as a general rule, the place of payment and performance is the place of the contract. [Citing authorities.] This rule is founded on the idea that, in making a personal contract to be fully performed in another state, the parties must have had that other state in mind."

To show that the parties did not intend the place of performance to be the place of the contract, when void at the place of performance, it must clearly appear that they intended to be governed by the law of the place where it was made. No such evidence exists in this case. Since the place of performance or payment is expressed in the notes, the presumption, therefore, is that the parties contracted with reference to the law of that place. The foregoing cases in this court were regarded as controlling and applicable to the pres-

ent case, and were not then, and are not now, considered to be at variance with the decision in *Seamans v. Knapp-Stout Co. Co.* 89 Wis. 171, 61 N. W. 757. The case of *Scudder v. Union Nat. Bank,* 91 U. S. 406, decided that where a bill of exchange had been drawn by a firm of Chicago, Illinois, upon a firm at St. Louis, Missouri, and there was a parol acceptance by a member of the St. Louis firm present in Chicago where the bill was drawn, the validity of such acceptance is governed by the place of acceptance. In passing opinion upon this question, the court stated the general rule quoted in the *Seamans Case,* without giving the well-established exception, generally recognized, but not involved in that decision nor in the *Seamans Case.* We must hold the decisions of this court upon the question now presented have accepted and adhered to the rule adopted by the court in this case, namely, "When a contract is made in one state or country, to be performed in another state or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation, and effect" (1 Daniel, Neg. Inst. § 865), unless it clearly appears that the parties intended the contract should be governed by the law of the place where it was made.

By the Court.—Motion denied.

FEY and others, Respondents, vs. THE I. O. O. F. MUTUAL LIFE INSURANCE SOCIETY OF PENNSYLVANIA, Appellant.

December 15, 1903—February 2, 1904.

Life insurance: Benefit societies: Contract limitations of actions: Waiver: Evidence: Estoppel: Agent: Service of summons: Proofs of death: Harmless error: Special verdict: Framing questions: Infancy of plaintiff: Failure to appoint guardian ad litem.

1. Where a benefit certificate, void in case of suicide, contained a provision that no action should be brought or maintained thereon unless commenced within one year from the death of insured, and action was commenced more than one year thereafter, a nonsuit should be entered, or a verdict directed, unless there are facts in evidence tending to show that the contract provision was waived or otherwise obviated.
2. In such case, it appeared, among other things, that insured died August 8, 1900, and proofs of death were duly furnished September 5, no objection thereto being made. November 28, 1900, the beneficiaries' attorney wrote asking when payment might be expected. Receiving no reply, he wrote again February 16, 1901, and was informed on February 19 that the matter was in the hands of claim committee, that he would be notified, and, on April 16, following, the company's secretary wrote the attorney that the claim was in the hands of the company's general counsel, investigation having developed the fact that death was the result of *suicide*, and "so soon as I have heard from him will communicate with you," followed by no further communication from the company. The action was commenced February 10, 1902. *Held*, that even if the letter of February 19, could be construed as a request, express or implied, to delay action, the letter of April 16 must be construed as putting an end to negotiation, and withdrawing any implied request for delay.
3. In such case, a letter dated November 28, 1900, from defendant to one who testified he was its local agent, considered, and *held* that even though the contents could be construed as a request for delay, yet the letter of April 16, to the attorney terminated the request, and hence the full contract year had expired before action was brought.

4. In an action on a benefit certificate, issued by a foreign corporation, providing that action must be begun within one year after the death of the insured, it appeared, among other things, that the death occurred August 8, 1900, and that action was commenced February 10, 1902; that G., a witness called by plaintiffs, testified he was defendant's agent up to February 16, 1902; that he collected and remitted dues and assessments as such agent; that he informed defendant of insured's death, signing himself "local agent," and that in response blanks were sent him and he made out the proofs of death. This evidence was introduced by plaintiffs to prove agency, and to justify subsequent introduction of G.'s declarations, as binding on defendant, which were received in evidence. *Held:*

   (1) That after successfully assuming G.'s agency and reaping the advantage of it for one purpose, plaintiffs could not abandon it for another purpose.

   (2) That G. was an agent for the service of process within the calls of subd. 9, sec. 2637, Stats. 1898.

   (3) That evidence produced by defendant, in effect, that G. was not defendant's agent, and that it never had any agents in Wisconsin, did not excuse plaintiffs' failure to bring the action within the year limited by the certificate.

5. Sec. 4234, Stats. 1898, extending for one year the limitation on commencement of an action, where the person entitled to bring the action dies before the term limited expires, applies to legal limitations, and does not affect limitations on bringing action provided by contract.

6. In an action on a benefit certificate, void in case of suicide, the fact that death was caused by drinking carbolic acid was proven beyond dispute, the real issue being whether the taking was accidental. Defendant offered in evidence the verdict of the coroner's jury that deceased came to his death by "taking carbolic acid." *Held*, even though the verdict was admissible, which may be doubted, that its rejection was not prejudicial error.

7. In such case, while the exclusion of the proofs of death, containing the statement that deceased "swallowed carbolic acid" is error, it did not prejudice defendant because that fact was not in dispute.

8. In an action on a benefit certificate where one material issue was whether the death of the insured was caused by suicide, sane or insane, a question of the special verdict "Did (deceased) come to his death as the result of an act voluntarily committed, with intent to produce death by his own hands?"

considered, and *held*, not well framed, though not materially defective.

9. Where a plaintiff is a minor, objection that no guardian *ad litem* was ever appointed is too late when raised for the first time in the supreme court. Such objection raises the question of plaintiff's legal capacity to sue, and must be taken by demurrer or answer, or it is waived.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action upon a life insurance policy or benefit certificate originally issued by the Piqua Mutual Aid & Accident Association, a foreign corporation, insuring the life of Fred C. Runge in the sum of $1,000, in favor of his wife. The evidence on the trial showed that the certificate was issued August 12, 1897, and that at that time Fred C. Runge, the insured, was a laboring man residing at or near the village of Ablemans, Sauk county, and having a wife, Henrietta Runge, and four minor children, Emma, *Frank,* Willie, and *Fred;* that in October, 1899, Henrietta having died, the four children were duly made beneficiaries of the policy by request of the insured; that July 1, 1899, the Piqua Company consolidated with the Potomac Life Insurance Company, a West Virginia corporation, which assumed all the contracts of the former company, including the certificate owned by Runge; that Runge died August 8, 1900, from the effects of taking carbolic acid, his assessments being all paid; that due proofs of death were served on the Potomac Company September 5, 1900, by Emma Runge, who was then married, and named Emma Brickman; that December 1, 1901, the Potomac Insurance Company consolidated with the defendant in this action, which is a Pennsylvania corporation, and which assumed all contracts and liabilities of the Potomac Company; that January 31, 1902, Emma Runge sold and assigned all her rights in the policy to the plaintiff, *Adolph Fey;* that Willie Runge died July 6, 1901, and that the plaintiff *Fey* was duly appointed administrator of his

estate; that the plaintiff *Frank Runge* was of age when this action was brought, or attained his majority soon afterwards, but the plaintiff *Fred Runge* was still a minor; that this action was commenced by the service of summons February 10, 1902; that the amount realized by assessments, and which was properly applicable on this policy, if anything was due thereon, was the sum of $930.

The court submitted to the jury a single question, as follows:

"Did Fred Charles Runge come to his death as the result of an act which he voluntarily committed, with intent to produce death by his own hand?"

This question was answered in the negative by the jury, and judgment for the plaintiffs for the amount due upon the policy, with interest from November 5, 1900, was rendered, and the defendant appeals.

For the appellant there were briefs by *Bentley & Kelley,* and oral argument by *F. R. Bentley.*

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

WINSLOW, J. The insurance policy or benefit certificate in the present case contained a provision that no action should be brought or maintained thereon unless it were commenced within one year from the date of the death of the insured. It was admitted by the plaintiffs in making their case that the insured died August 8, 1900, and that this action was commenced February 10, 1902; hence the plaintiffs should have been nonsuited, or a verdict for the defendant directed, unless there were some facts in evidence tending to show that the requirement of this provision had been waived or otherwise obviated. It is claimed by the plaintiffs that this requirement was not operative here, *first,* because the evidence shows that the insurance company has waived its right to insist thereon; *second,* because the evidence shows

that the insurance company had no agent in this state upon whom service could be made; and, *third,* as to the interest of Willie Runge, at least, that by the provisions of sec. 4234, Stats. 1898, the time for bringing the action was extended by reason of his death, which took place July 6, 1901. These contentions will be taken up in their order:

1. This court has held, in accordance with authorities elsewhere, that if an insurance company, by its acts, induces the beneficiary to delay bringing suit on the policy, the time of such delay is not to be reckoned as a part of the time limited for the bringing of the action. *Killips v. Putman F. Ins. Co.* 28 Wis. 472; *Black v. Winneshiek Ins. Co.* 31 Wis. 74. In the first case above cited there was evidence showing that the general agent of the company wrote to the insured, stating that the proofs already furnished were defective, and promising to call and see the insured with reference to the matter during the following month, and that the insured delayed furnishing additional proofs or commencing suit, relying on this promise, which was never fulfilled; and it was held that this was sufficient to go to the jury as proof of waiver. In the *Black Case* it was held that an agreement made between the insured and the insurance company, soon after a fire loss, providing that the insured would accept a certain sum in full payment, and that the company would pay that sum on or before a certain date, three months in the future, unless it should previously notify the insured that it would contest the loss, waived the limitation for the time during which the agreement ran, no such notice having been given. It is manifest that the proof in the present case does not bring it within either of the above cases. The evidence here shows that the proofs of death were duly furnished September 5, 1900, and no objection was ever made to them. November 28, 1900, Mr. Grotophorst wrote to the Potomac Company, stating that he was retained by the heirs of Runge, and asked when payment of the policy might be expected. Re-

ceiving no reply to this letter, he wrote again February 16, 1901, stating that he had heard nothing from the company, and asking the company to report at once what they intended to do; that, in case of refusal to pay, he would take steps to collect the amount due on the policy. To this letter the company replied February 19, 1901, by letter stating that "the matter is now before our claims committee and owing to the absence of our adjuster, we cannot at the present moment give the full facts in regard to the same but you will be duly notified upon return of said adjuster to this office." On April 16th following, the company's secretary sent to Grotophorst a letter stating that "the claim is in the hands of the company's general counsel, investigation having developed the fact that death was the result of *suicide*. So soon as I have heard from him will communicate with you." This was the last letter sent to Grotophorst. It appears further that the claim at about this time was in the hands of Mr. E. A. Jones, an attorney at Washington, D. C., where the home office of the Potomac company then was, and that on April 20, 1901, the secretary of the company wrote to him, stating that "all the papers in the Runge case have been sent to Gov. Hart, the company's general counsel, to whom you are referred." No further negotiations or letters between the company and either Grotophorst or Jones are shown. There is very little in this correspondence which could reasonably be construed as a request, either express or implied, to delay action; but, conceding that the letter of February 19th might be so construed, and that it was acted upon, still the letter of April 16th, stating that the cause of death was suicide, and that the papers had been placed in the hands of the company's counsel, must certainly be construed, especially when received by an attorney at law, as quite definitely putting an end to negotiation, and withdrawing any implied request for delay. In this view of the matter, there was only two months' delay on account of acts of the company; and,

as the action was delayed six months beyond the termination of the year, it is plain that, even if the two months be deducted, the action was still brought four months after the expiration of the year. There was another line of evidence, however, that was somewhat relied upon to prove waiver. One Geisser was called as a witness, who testified that he was local agent at the village of Ablemans both of the Piqua Company and its successor, the Potomac Company, and he produced some correspondence with the Potomac Company in reference to the claim. It appears that Geisser assisted in preparing and forwarding the proofs of death in September, 1900, and afterwards wrote several letters to the company concerning the claim, in which he signed his name as "local agent." November 28, 1900, he received the first reply to his inquiries from the company; stating, in effect, that there was litigation pending against the old Piqua Association, but that they believed that all claims would soon be adjusted to the satisfaction of all, and that all claims would be listed according to date of approval, and paid in their turn. March 18, 1901, he received another letter from the company, stating that the Runge claim would be taken up "the last of this month or the first of next for settlement." Geisser also testified that he received a letter from the company in reply to one written by himself about eight months after Runge's death, in which they said they would settle the case soon, but this alleged letter could not be found. Mr. Grotophorst testified, against objection and exception, that he had a conversation with Geisser about the last of February or the first of March, 1901, in which Geisser told him that the matter would be settled shortly, within two weeks or two months, and that Geisser then showed him some letters from the company in which they stated that the matter would be adjusted. There is no testimony that Geisser acted in any degree as agent of the beneficiaries in this correspondence, or that they even knew of his action; but even conceding that the letter of No-

vember 28, 1900, could be construed as a request for delay, still the letter of April 16th to Grotophorst would terminate the request, and the delay occasioned, at the most, was less than five months, so that the full year had expired before the bringing of the action.

2. It is claimed that the plaintiffs were excused from bringing the action within the year because the evidence shows that the Potomac Company had no agent in the state upon whom service could be made. This contention is based upon the testimony of one Bristow, the secretary of the Potomac Company, to the effect that Geisser was never agent of that company, and that it had no agents in Wisconsin. The argument is that the one-year limitation clause cannot apply if by its own act of omission the company makes it impossible for the policy holder to commence an action upon the policy in the local courts, because, in such case, the company has prevented the commencement of the action by its own act, and, if the limitation were to be held effective, the company would be taking advantage of its own wrong. There is much reason in the argument, and it has been directly approved by the supreme court of Michigan. *Peoria M. & F. Ins. Co. v. Hall,* 12 Mich. 202. It is not necessary to pass upon the question here. The plaintiffs are in no position to make the contention that the Potomac Company had no agent in Wisconsin. They put upon the stand as a witness Mr. Geisser, before mentioned in this opinion, and proved directly by him that he was the local agent of the Piqua Company, the Potomac Company, and the defendant company during the whole time that they did business at Ablemans, and up to February 16, 1902; that he received and remitted dues and assessments as such agent; that he wrote numerous letters to the Potomac Company, signing them as "local agent"—among them being a letter notifying the company of Runge's death, and requesting that claim blanks be forwarded; that such blanks were at once forwarded to him;

and that he made out the proofs of death. Not only is it apparent that this testimony was introduced for the purpose of proving the fact of Geisser's agency, in order to justify the subsequent introduction of Geisser's statements to Grotophorst, as binding on the company, but plaintiffs' attorneys definitely stated to the court that such was the object of the testimony; and the statements made by Geisser to Grotophorst were in fact afterwards received in evidence for that reason. After successfully assuming this position and reaping the advantage of it for one purpose, the plaintiffs cannot abandon it for another purpose. If Geisser was enough of an agent to make his declarations admissible against the company, he was enough of an agent for the purpose of service of process, especially when subd. 9, sec. 2637, Stats. 1898, is considered, by the broad and sweeping terms of which it is provided that service upon a foreign insurance company may be made upon any one who aids or assists the company in transacting any business.

3. Nor do we think that the provisions of sec. 4234, Stats. 1898, have any bearing on the question even as to the share of Willie Runge who died July 6, 1901, and within the year. That section provides:

"If any person entitled to bring an action die before the expiration of the time *limited* for the commencement thereof and the cause of action survive, an action may be commenced by his representatives after the expiration of that time and within one year from his death."

It forms a part of the chapter on legal limitations of actions. After providing in numerous sections the specific limitations upon various forms of action, the chapter proceeds to specify certain exceptions to the running of the limitations. Sec. 4231 provides, in substance, that if the defendant be out of the state when the action accrues, or depart from and reside out of the state after it accrues, the time of his absence shall not be deemed a part of the time limited.

Sec. 4232 provides that, when a person is an alien enemy, the time of the continuance of the war shall not be a part of the time limited. Sec. 4233 provides, in substance, that if any plaintiff (except in certain cases) at the time the action accrues be a minor, or insane, or imprisoned on a criminal charge, or in execution under a sentence for a term less than life, the time of such disability is not to be a part of the time limited for the commencement of the action, with certain provisos, not necessary to be stated; and then follows sec. 4234, the terms of which have been previously stated. It seems to us very clear that these sections were designed simply to make the chapter on legal limitations a harmonious whole, and that, when they refer to "the time limited for the commencement of the action," they refer to the time limited by law, as laid down in the previous sections of the chapter. Legal limitations, and not contract rights, is the subject under consideration. Had there been an intention to affect the terms of contracts, it would have been very easy of statement, and it seems certain that it would have been indicated in some unequivocal manner. It has been directly held that the statutory exception in favor of minors does not affect the contract limitation. *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 9 S. W. 676; 4 Joyce, Insurance, § 3196; *O'Laughlin v. Union Cent. L. Ins. Co.* 11 Fed. 280. See, also, *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 386.

Our conclusion is that a nonsuit should have been granted, or, in default of a nonsuit, that a verdict for the defendant should have been directed at the close of the evidence.

There are some minor questions presented, which perhaps deserve attention, especially in case of another trial. An inquest was held upon the body of Runge, and a verdict rendered that he came to his death by "taking carbolic acid." The defendant offered the verdict in evidence, and it was rejected, and this ruling is claimed to be error. Conceding that the record was admissible, which may be a matter of

some doubt (*Olwell v. Milwaukee St. R. Co.* 92 Wis. 334, 66 N. W. 362), there was no prejudicial error in the ruling, because the fact that the death was caused by drinking carbolic acid was proven beyond dispute, and was, in substance, admitted, and the only real question was whether the taking was accidental.

Again, the defendant offered in evidence a part of the proof of death made by Emma Brickman, in which she stated that the deceased "swallowed carbolic acid," and the evidence was excluded. This was plainly error, because, though the proof was not made by any of the plaintiffs, still it was made on behalf of all the beneficiaries, and the rights of all were dependent upon the fact that these proofs had been made; hence any statements required to be made therein were admissible against all, the fact being that the other beneficiaries had made no separate and independent proofs, and relied solely on Emma's proofs; but here, again, there was no prejudice, as the fact was not in dispute.

The form of the question submitted to the jury is criticised, and while, perhaps, there is no ground for holding it materially defective, it must be said that it was not well framed. The sole material question was whether the death of the insured was caused by suicide, sane or insane; and the question should have been framed, if not in these words, at least in such words as to clearly put this exact issue before the jury.

The plaintiff *Fred Runge* is a minor, and it does not appear that any guardian *ad litem* was ever appointed for him. Objection is made in this court for the first time that he cannot maintain the action, on account of his being an infant when the same was commenced. The objection is too late. It is an objection that the plaintiff has not legal capacity to sue, and this objection must be taken by demurrer or answer, or it is waived. Sec. 2654, Stats. 1898.

Another very vital question is presented by the briefs and

arguments. The policy provided that "if the death of the insured is caused by suicide, whether the insured be sane or insane," it should be avoided; and the appellant contends that the evidence shows with such clearness as to exclude every other reasonable hypothesis that Runge committed suicide, so that a verdict for the defendant should have been directed on this ground. There are but four justices participating in the decision of this appeal, and there is an equal division of opinion upon the question; hence there can be no reversal on this ground, and no useful purpose subserved by a recital or discussion of the evidence.

By the Court.—Judgment reversed, and action remanded for a new trial.

SIEBECKER, J., took no part.

CEZIKOLSKI, Respondent, vs. FRYDRYCHOWICZ, Appellant.

January 12—February 2, 1904.

Tax titles: Constructive possession: Subsequent tax deed: Limitation of actions: Quieting title.

Plaintiff, grantee under a tax deed fair on its face but voidable for irregularities, which had been duly recorded more than three years before the action was commenced, brought action to quiet title against the holder of a subsequent tax deed fair on its face but voidable for irregularities, which had not been recorded three years. The lands had been at all times vacant and unoccupied. Plaintiff's deed had not been recorded full three years before the recording of defendant's deed. *Held,* that plaintiff's title had become perfect by force of secs. 1187, 1188, Stats. 1898, prior to the bringing of the action.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action in equity to remove a cloud upon the title of forty acres of land, and the defendant counterclaims, and claims title in himself, and asks to have plaintiff's alleged title removed as a cloud. The land itself is, and has always been, vacant and unoccupied. The plaintiff claims title under a tax deed executed by Chippewa county to the plaintiff's grantor May 17, 1897, for the taxes of the year 1893, which deed was in due form, and was recorded on the day of its execution. The defendant claims under a tax deed also in due form, executed by Chippewa county to the defendant's grantor March 7, 1900, for the taxes of the year 1895, which deed was duly recorded March 9, 1900. It was admitted that both tax deeds were voidable for irregularities in the tax proceedings on which they were based, unless they had been cured by some statute of limitations. The plaintiff, by his reply, pleaded the three-year statute of limitations, under secs. 1187 and 1188, Stats. 1898. The court found that the plaintiff's title was good, and that defendant's claim was unjust and illegal, and that the plaintiff was entitled to the removal of the cloud upon paying into court the amount for which the lands were sold for the taxes of 1895, and also the amount paid by the defendant to redeem the lands from the tax sale of 1897, with fifteen per cent. interest. These sums being paid, judgment for the plaintiff was rendered, with costs, and the defendant appeals.

For the appellant there was a brief by *W. F. Bailey* and *W. H. Frawley,* and oral argument by *Mr. Bailey.* To the point that the title acquired under a tax sale for a subsequent year must prevail over a title founded on a sale for a previous year, they cited, *Anderson v. Rider,* 46 Cal. 134; *Chandler v. Dunn,* 50 Cal. 15; *White v. Knowlton,* 84 Minn. 141, 86 N. W. 755; *Board of Regents v. Linscott,* 30 Kan. 240; *Campbell v. Stagg,* 37 Kan. 419. Constructive adverse possession was as effectual to bar the plaintiff as an actual adverse possession. *Warren v. Putnam,* 63 Wis. 410, 415;

Lewis v. Disher, 32 Wis. 504, 507; *Cornell University v. Mead,* 80 Wis. 387, 390; *Hart v. Smith,* 44 Wis. 213.

W. M. Bowe, for the respondent.

WINSLOW, J. Both parties claim title to unoccupied land under tax deeds fair on their face, but voidable for irregularities, unless such irregularities have been cured by a limitation statute. The plaintiff's deed was recorded May 17, 1897, and the defendant's deed (based on a subsequent tax) was recorded March 9, 1900, so that two years and ten months had elapsed after the recording of the plaintiff's deed when the defendant's deed was recorded. Had the plaintiff's deed been recorded for three entire years before the execution and recording of the defendant's deed, there is no doubt that the plaintiff's title would have been perfected by the three-years statute of limitations; but the defendant claims that, when he put his deed on record prior to the expiration of the three-years period, he interrupted the running of the statute, and hence plaintiff's title has not been perfected. The lands were at all times vacant and unoccupied, and it is familiar law that under such circumstances the tax-title claimant, who has a recorded deed valid on its face, is deemed to be constructively in possession of the premises, and, if the original owner does not bring his action within three years, he is barred from bringing any action, and the tax title becomes unassailable. The defendant's position is that exclusive constructive possession for three years is absolutely essential to the plaintiff's right; that when the defendant's subsequent tax deed was recorded the plaintiff's constructive possession must necessarily have ceased, and constructive possession by the defendant begun; hence that the plaintiff's title has never been made perfect by the statute of limitations, but is still open to attack for irregularity, and that defendant's tax title, being for a later tax, is the better title. The difficulty with this reasoning is that

it elevates a mere legal fiction into a controlling element of a statute which does not even refer to it. Our statutes regarding the effect of tax deeds are quite simple. If the tax deed be fair on its face, and founded upon regular proceedings, it conveys a valid title in fee simple as against all the world, subject only to be divested by a tax deed based upon a subsequent tax. Sec. 1176, Stats. 1898. If, however, the deed, though fair on its face, be voidable for irregularities in the proceedings, it may be rendered valid by the limitation statutes (secs. 1187, 1188, Stats. 1898) either by three years' actual possession by the grantee in the deed, or, in case of vacant and unoccupied land, by the lapse of three years after the recording of the deed without action by the original owner. The statute of limitations says nothing about constructive possession. This court, it is true, has frequently spoken of constructive possession, and has, in substance, said that when a tax deed in due form is recorded, and the lands covered by it are vacant and unoccupied, the tax-title grantee is deemed to be in constructive possession, and that this constructive possession for three years is equivalent to actual possession in its legal effect. As matter of fact, no one has been in possession. The lands have been actually vacant all the time, and the phrase has been used simply as a matter of convenience to describe a condition of vacancy under special circumstances, namely, vacancy with a tax deed duly recorded. No particular reason is perceived why one tax-title claimant may not be in "constructive possession" as to the original owner, and a subsequent tax-title claimant may not also be in constructive possession as to both the original owner and the prior claimant at the same time. The shadowy possessions will certainly not crowd each other. The whole force of the defendant's argument depends on the proposition that there can be but one constructive possession at the same time, and hence that when the second tax deed was recorded the ghostly shade which represented the plaintiff must

necessarily have glided noiselessly from one side of the land while the equally diaphanous shade of the defendant glided in upon the other side. If this were held to be the case, the consequences would be somewhat singular. For instance, one result would seem to be that the original owner is not yet cut off from contesting the plaintiff's title, though the three years fixed by the statute have passed, and the original owner has never been in actual possession, nor brought his action as the statute requires. Suppose some subsequent tax had remained unpaid, and another tax deed had been recorded just before the expiration of three years after the recording of the defendant's deed, would there have been a break in defendant's constructive possession, and the original owner afforded another three years to bring actions to set aside both titles; and, if so, how often may the process be repeated? To our minds, the attempt to nullify a perfectly plain limitation statute by a finespun metaphysical argument as to the possibility or impossibility of two coexistent constructive possessions in the same piece of land cannot be regarded seriously. The facts in evidence show that the plaintiff's title had become perfect by force of the statute of limitations as against the original owner or owners prior to the bringing of this action, and hence he had a right to bring his action to remove the cloud cast upon his title by the defendant's tax deed, which is conceded to have been voidable by reason of irregularities in the tax proceedings.

There are no other contentions which are deemed of sufficient importance to demand special treatment.

By the Court.—Judgment affirmed.

CAXTON COMPANY, Appellant, vs. SCHOOL DISTRICT NUMBER FIVE, TOWN OF SPOONER, Respondent.

January 12—February 2, 1904.

Schools and school districts: Officers: Purchases: Authority: Ratification.

Sec. 432, Stats. 1898, governing common schools, provides that no act authorized to be done by the board shall be valid unless voted at its meetings, and sec. 436, provides that all purchases shall be approved at a regular meeting of the board at which all the members are present. The clerk and director of the defendant district met plaintiff's agent on the highway, agreed with the latter to purchase of the plaintiff for the district certain supplies, and gave a school order therefor. No meeting of the school board, nor approval of the purchase at a meeting of the school board was had. Plaintiff's agent, in discharge of the contract, left the supplies at the district school house, without the knowledge of the district officers, and thereafter the annual district meeting repudiated the transaction. *Held:*

(1) That the school order, and the agreement on which it was based were invalid.

(2) That nothing short of some affirmative corporate action by the district would constitute ratification of the transaction.

(3) That neither mere silence of the district officers, nor the depositing of the supplies in the district school house, and their subsequent use, constituted a valid ratification.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

Plaintiff, being the owner of what on its face purported to be a school order issued to it by the defendant through its authorized officer, payment of which had been refused, commenced this action to recover upon the alleged indebtedness forming the basis thereof. The issues made by the pleadings were decided by the court according to a stipulation of facts made by the parties in effect thus:

October 3, 1899, the clerk and director of the defendant district met plaintiff's agent on the highway and agreed with the latter to purchase of plaintiff for the district a chart of

the Caxton School Series, giving therefor in form a district school order for $37.50 payable March 1, 1901. The treasurer of the school district did not participate in or know of the transaction. No meeting of the school board was held as provided by sec. 432, Stats. 1898, at which the subject of purchasing the chart was mentioned. No approval of the purchase of the chart at a meeting of the school board was had, as provided by sec. 436, Id. Plaintiff's agent, some time after the transaction with him aforesaid, in discharge of the plaintiff's contract, left the chart at the schoolhouse in the district, without the knowledge of the school district officers. They learned of the fact in that regard some time thereafter. The chart was used some by the teachers, but not by authority of the district or its officers. In October, 1901, plaintiff was notified that the chart was its property and subject to its disposal. The school order mentioned is the property of the plaintiff. At the annual district school meeting held in July, 1901, the electors of the district, then duly assembled, repudiated the transaction with the plaintiff. May 1, 1901, payment of the school order was refused, first because it was illegal, and second, for want of funds applicable thereto.

From such facts the conclusion was reached that plaintiff had no cause of action, and judgment of dismissal with costs was ordered accordingly. Judgment was entered pursuant thereto, and plaintiff appealed.

The cause was submitted for the appellant on the brief of *Mead & Hoar,* and for the respondent on that of *A. L. Bugbee.*

MARSHALL, J. The judgment must be affirmed. On the facts, as original matters, the school order, and the agreement upon which it is based as well, are condemned by secs. 432, 436, Stats. 1898. The former provides that, "No act authorized to be done by the board shall be valid unless voted at its meeting." The latter provides that all purchases of

the character of the one in question "shall be approved at a regular meeting of the board at which all the members are present." The competency of the school district officers to ratify an absolutely void act, giving it original validity, by mere silence, is ruled against appellant by the elementary principle that under no circumstances can an official act, not performed in the manner required by law, and expressly prohibited unless so done, be ratified by those guilty of nonfeasance or misfeasance in the matter, by any less formal action than should have been originally had. As to whether respondent ratified the purchase of the chart by the mere fact that it was deposited by the plaintiff in its schoolhouse and has remained there and been used by its teachers, without its authorization, is ruled against appellant by *Kane v. School Dist.* 52 Wis. 502, 9 N. W. 459, and *McGillivray v. Joint School Dist.* 112 Wis. 354, 88 N. W. 310, to the effect that the mere receipt by school district officers, of property purchased by them as such without authority and the use thereof by district agencies, does not constitute a ratification of the purchase by the electors; that nothing short of some affirmative corporate action by them will accomplish that result, and then only where they had original authority in the matter. There does not appear to be any basis whatever in the findings for an argument in support of appellant's claim. It is confessed by its counsel, as we understand it, that the school order, and the contract upon which it is based as well, are void, unless made good by ratification, and all circumstances upon which that could be rightly predicated in any event are expressly negatived in such findings.

By the Court.—The judgment is affirmed.

WELSH, Appellant, vs. MANWARING, Respondent.

January 12—February 2, 1904.

Administration: Next of kin: Right of appointment: Mandatory statutes: Public administrator.

1. The right of administration of a decedent's estate is not inherent, but statutory, and may be given or withheld in the discretion of the legislature.
2. The provisions of sec. 3807, Stats. 1898, that administration shall be granted to the widow, surviving husband, or next of kin, or to the person whom such relatives may request to have appointed, if suitable and competent to discharge the trust, is mandatory, and in itself declares its only exceptions.
3. By subd. 2, of said sec. 3807, the right of the next of kin, etc., is limited to the case where the application is made within thirty days after the death, and when he or the person nominated is suitable. Plaintiff, a nonresident of Wisconsin, and a half-brother of decedent, within thirty days after the death, applied for administration to be granted to his nominee, a suitable person. The court denied the application, and, on application of creditors, appointed the public administrator to the office. *Held*, that plaintiff was absolutely entitled to have his nominee appointed, and the refusal was error.
4. In such case, the power to appoint the public administrator to the office of administrator is limited by sec. 3819, Stats. 1898, until administration "shall, upon proper application of some person entitled to apply therefor, be granted to some other person."

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Deceased died December 5, 1902, resident in Douglas county, in the state of Wisconsin, leaving as her sole heir and next of kin *James A. Welsh,* a half-brother, resident at Kansas City, Missouri. On December 10, 1902, a petition was filed by the public administrator, *E. B. Manwaring,* for administration, alleging certain personal property to have been left by the deceased. He was so appointed, and thereupon took possession, and on December 15th, under order of the

county court, sold the property. Meanwhile claims were filed approximating in amount the total of the estate, of some of which, however, the validity is disputed by appellant. On December 20th, within thirty days after the death, *Welsh* made petition for appointment, as administrator, of E. A. Le Claire, resident of Douglas county, as to whose competency and suitability some affirmative proof was offered, and no objection was raised. This was met by a paper, signed by most of the unsecured creditors, asserting that the estate was insolvent, and that *E. B. Manwaring,* as special administrator, had acted for the best interests of the estate in making sale of the property, and that his retention as administrator would be for the benefit of the estate, and would avoid expenses of a new administrator. The county court held that the brother, not being an inhabitant of the state of Wisconsin, was not entitled of right to name the administator against the wishes of the creditors, and, reciting that *E. B. Manwaring,* "as public administrator," is a suitable and competent person, ordered that said *Manwaring* be appointed administrator of said estate. *Welsh* appealed to the circuit court, which, after hearing, adjudged that the order denying the petition for the appointment of Le Claire be affirmed and the appeal be dismissed, and that the record be remitted with directions to the county court to proceed with the administration of the estate. From that judgment *James A. Welsh* brings this appeal.

For the appellant there was a brief by *A. C. Titus,* attorney, and *Bert Fesler,* of counsel, and oral argument by *Louis Hanitch.*

For the respondent the cause was submitted on the brief of *D. E. Roberts.*

DODGE, J. The right of administration, while a very valuable one, is not inherent, but statutory. It may be given or withheld in the wisdom of the legislature. Under this power

our legislature has provided, by sec. 3807, Stats. 1898, that administration shall be granted first to the widow, surviving husband, or next of kin, or to the person whom such relatives may request to have appointed, if suitable and competent to discharge the trust. This statute is clearly mandatory, and in itself declares its only exceptions. Such statutes have uniformly been treated as controlling the action of the courts of probate, and disobedience thereof has been deemed to constitute error subject to review in appellate tribunals. *Stebbins v. Lathrop,* 4 Pick. 33, 43; *Cobb v. Newcomb,* 19 Pick. 336; *Todhunter v. Stewart,* 39 Ohio St. 181; *State ex rel. Adamson v. Collier,* 62 Mo. App. 38; *Breen v. Pangborn,* 51 Mich. 29, 16 N. W. 188; *Sargent's Estate,* 62 Wis. 130, 22 N. W. 131. By subd. 2 of the same section, this right of the next of kin is limited to the case where he applies within thirty days after the death, and when he or the person nominated by him is suitable. When those conditions fail, and not till then, do the creditors acquire any right over the nomination of an administrator; hence the appointment of respondent as permanent administrator cannot be justified by the request of certain creditors.

These statutes would seem so direct and clear as to need but their mention to make plain the appellant's right to have appointed the person requested by him, as to whose competency or suitability no question is raised; but the respondent, and apparently the court below, deemed these plain provisions controlled by sec. 3819, Stats. 1898, relating to the appointment of the public administrator in certain cases. That section provides in substance that when any intestate leaves no widow, surviving husband, or next of kin known to the county court, living in this state, the court, upon its own motion or upon the application of the public administrator, shall, if it deem necessary, grant administration to the public administrator, who may then proceed with the administration, "until administration . . . shall, upon

proper application of some person entitled to apply therefor, be granted to some other person." This quoted clause seems to have been wholly overlooked by the respondent in making his contention that, whenever no widow or next of kin of an intestate is found in the state, administration is to be granted absolutely to the public administrator, and that, as a result, sec. 3819 in effect limits sec. 3807 to the case of relatives resident in the state. That contention is wholly inconsistent with the idea of sec. 3819, which obviously provides merely for a temporary situation, and authorizes appointment of the public administrator only until those having lawful right under sec. 3807 shall make proper application. Hence we conclude that when the next of kin, within thirty days after the death of this intestate, made due application for the appointment of a competent and suitable person resident in this state, he was absolutely entitled thereto, and that the refusal of such appointment was error.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in accordance with the foregoing opinion; appellant's taxable costs to be payable out of the estate.

RUSCHER, Respondent, vs. CITY OF STANLEY, Appellant.

January 12—February 2, 1904.

Municipal corporations: Sidewalks: Personal injuries: Negligence: Notice of injury: Sufficiency: Evidence: Contributory negligence: Appeal and error: Questions submitted in special verdict: Construction: Excessive damages.

1. In an action for personal injuries by reason of an alleged defect in a sidewalk of defendant city, the notice thereof to the city considered, and *held* to comply with the requirements of sec. 1339, Stats. 1898, and to describe the place of injury and

insufficiency complained of with sufficient particularity to inform the city of the place of the accident.

2. In such case, the insufficiency alleged consisted in a loose board on which plaintiff tripped, which caused him to fall and sustain injuries. It appeared from the evidence, among other things, that, on the day succeeding the accident, the city officers made a minute inspection and found no board loose; that the day following the service of the notice the city attorney, with others, made an inspection, including the place of the accident, and that some days thereafter the city attorney and mayor again examined it, and found one end of a plank loose at the place of accident. *Held*, that such facts left no room for a claim that defendant was misled as to the place of injury, and thereby prevented from making the necessary inspection.

3. In an action for personal injuries alleged to have been occasioned by the insufficiency of a sidewalk, testimony of a witness, to whom plaintiff pointed out the place of the accident, that he saw loose planks in the walk, is competent and material as tending to show the nature of the insufficiency at the place of the accident.

4. In an action for personal injuries, the evidentiary facts before the court examined, and *held* that several hypothetical questions propounded to a witness as an expert were properly excluded.

5. In an action for personal injuries where the record, supported by the judgment of the trial court, shows that the plaintiff was free from any want of care contributing to produce the accident, defendant cannot complain of a refusal to submit the question of plaintiff's contributory negligence to the jury.

6. The findings of a special verdict should be interpreted so as to harmonize with each other if it is reasonable to do so under the facts and circumstances of the case.

7. When, in an action for personal injuries, in answering one question of a special verdict the jury find that the sidewalk in question was defective, and by the answer to another question that the defendant was injured thereon as a natural and probable result of the defective condition, and that the city officers should have anticipated such an injury might result from the defect, the latter finding necessarily implies that the sidewalk was not reasonably safe for public use.

8. In an action for personal injuries sustained by a fall on a defective sidewalk, where it appeared, among other things, that plaintiff sustained a severe shock to his nervous system, attended by fever; that he endured much pain and general im-

pairment of health; that he was confined to the house about a month, and that he incurred liability for medical attendance of $125, a verdict of $750 is *held* not to be excessive.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

An action by respondent to recover damages for personal injuries alleged to have been sustained by reason of the insufficiency and want of repair of a sidewalk in the city of *Stanley*. It appears that respondent was in the city of *Stanley* on the evening of December 5, 1901, and while walking on the east side of Willard street, in company with one Boardman, was tripped by a loose board in the walk, which caused him to fall and sustain injuries. The jury found these facts by special verdict: (1) There was a defect in the sidewalk, as claimed by respondent, at the time and place in question. (2) The sidewalk in question was insufficient and in want of repair for such a length of time before the accident that the officers of the city, in the exercise of reasonable care, should have discovered this defect, and have repaired it, before the injury; and therefore the defect had existed a sufficient length of time before the accident to give appellant notice to repair. (3) That the defect complained of was the proximate cause of respondent's injuries. (4) That respondent sustained damages, as a result of the injuries, in the sum of $750. It further appears that the defect complained of consisted of loose planks in the sidewalk, laid upon stringers; and that the place of defect was in the walk on Willard street, about six to eight feet south from Bartlett street and about 200 feet north from the Wisconsin Central railway track on Willard street. Respondent served notice on December 13, 1901, under sec. 1339, Stats. 1898, of the place and the nature of the insufficiency, and that damages were claimed. After verdict, appellant moved to change the answer of the jury in the special verdict rendered, and for judgment in its favor, which was denied, and thereupon moved to set aside

the verdict and for a new trial. This motion was denied, and judgment was ordered and entered upon the verdict in favor of respondent. This is an appeal from the judgment.

For the appellant there was a brief by *C. B. Culbertson,* attorney, and *James Wickham,* of counsel, and oral argument by *Mr. Wickham.*

W. M. Bowe, for the respondent.

SIEBECKER, J. Appellant claims that the notice given the city of the place where the injury occurred, and describing the insufficiency complained of, with a demand for damages, did not comply with the requirements of sec. 1339, Stats. 1898. The notice stated that respondent sustained damages from a personal injury caused by reason of the insufficiency and want of repair of the sidewalk "extending upon and along the east side of Willard street and on the north side of the Wisconsin Central (Line) Railroad track, at a point south from the crossing of Willard and Bartlett streets about one third the distance between said crossing and the said railroad track, . . . and that the insufficiency and want of repair of said sidewalk consisted of a loose, rotten plank and rotten stringers." There was evidence showing that respondent, in company with the witness Boardman, was walking on this sidewalk toward Bartlett street; that it was at about eight o'clock in the evening, and dark; that respondent walked on the side nearest the traveled portion of the street, carrying a lantern in his right hand; that Boardman stepped on a plank of the sidewalk, which flew up, and caused respondent to fall and sustain injuries. The sidewalk from the railway track to Bartlett street was a uniform and continuous walk, consisting of plank boards, laid crosswise, fastened to stringers. At the place of the alleged insufficiency the walk was raised about two feet above the surface of the ground. The notice is attacked for indefiniteness in describing the place and the insufficiency complained of. It does not at-

tempt to give the place by exact description of some particular portion of the walk located by a fixed object or point, but describes it as within the walk on the east side of Willard street, north of the railway track, at a place, south from the crossing of Willard and Bartlett streets about one third the distance between the crossing and the railway track. Respondent asserts the notice indicates and was intended to fix the place of insufficiency at about one third this whole walk south from the north and only sidewalk crossing on Willard and Bartlett streets, while appellant insists that the crossing designated can only be applied to the south line of the cross-street. Taking the notice as interpreted by respondent, the place of accident, as found by the jury, would nearly correspond to the point indicated in the notice. It must be observed, however, that the notice did not specify the place by exact measurement from any fixed object or point, but located it at a place about one third of the distance south from the street crossing of Willard and Bartlett streets to the railway tracks. Taking the notice to designate a place about one third of the distance south from the south line of Bartlett street, it still describes the place with sufficient particularity to inform the city of the place of insufficiency. It would be an unreasonable limitation upon the terms of the notice to hold it did not describe the place with sufficient certainty.

It is urged that appellant's officers were in fact misled by the notice, and therefore had no opportunity to make careful inspection of the place of accident immediately after it happened, and were unable to ascertain the facts and circumstances concerning the alleged insufficiency. The evidence shows that some of the city officers made a minute inspection of this sidewalk on the day succeeding the accident, to ascertain whether planks were loose, or otherwise out of repair; that they examined every plank, and found none loose, nor discovered any other defects. It also appears that

on the day following the service of this notice the city attorney, with others, made an inspection and examination of the sidewalk, including the place of accident; and some days thereafter he and the mayor again examined it, and found one end of a plank loose at the place of accident. These facts can leave no room for claiming that respondent misled the city as to the place of injury, and thereby prevented the necessary inspection and examination of the place of insufficiency found by the jury. Nor do we find evidence tending to support the claim that respondent intended to mislead the city officers in respect to any requirements of the notice. The trial court's rulings upon these questions are fully sustained by the record.

Error is assigned upon rulings in the admission and exclusion of evidence. The witness Blaisdell testified he saw loose planks in the walk at the place where respondent fell, in the month of November, and that respondent showed him the place of accident. Respondent testified that he pointed out the same place to this witness, described in his testimony, as the place of defect and accident. This testimony was competent and material as tending to show the nature of the insufficiency at the place of accident.

Several hypothetical questions were propounded by appellant's counsel to Dr. Lyman as an expert. The first question pertains to loss of motion in respondent's limbs, and was predicated upon the fact that he had suffered a former injury. This inquiry was properly excluded upon the ground that there was no evidence of such former injury. The two succeeding inquiries were directed to elicit the doctor's opinion whether a spinal injury could result from falling forward upon the anterior portion of the body while walking on a sidewalk. The court sustained an objection to the first question because the hypothesis failed to include necessary facts then in evidence, and to the second for the same reason, and that it was improper in form. An analysis of the

hypothesis and inspection of the evidentiary facts before the court show the rulings were proper upon both grounds.

It is contended that the court erred in refusing to submit, as requested by appellant, the question of respondent's contributory negligence. Is there room for conflicting reasonable inferences upon the question of contributory negligence upon the facts and circumstances surrounding the accident? From the evidence above alluded to it appears that the accident occurred at about eight o'clock in the evening of December 5th; that there was no light except what came from the lantern carried by respondent; that the loose plank lay in place on the stringers, and flew up before him when Boardman, who walked beside him, stepped on the other end. Nothing appears tending to show respondent had knowledge of the defective condition of the walk. The nature of the defect, its concealment from ordinary observation in daylight, seems quite apparent. That it must have been obscured from view to one passing over it at night, is not a debatable question. Nor is there anything in the manner of its occurrence or the attending circumstances of the accident indicating any want of care by respondent contributory to produce the injury. Upon this state of the record, showing respondent was free from any want of care contributing to produce the accident, supported by the deliberate judgment of the trial court that the evidence did not tend to show contributory negligence, we must hold that appellant has no grounds to complain of the refusal to submit this question to the jury. *Nicoud v. Wagner,* 106 Wis. 67, 81 N. W. 999; *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813.

It is argued the court erred in holding that the street was not a reasonably safe one for public use under the finding of the jury by the special verdict. The first question of the verdict is, Was there a defect in the sidewalk at the time and place in question? This the jury answered in the affirmative. Counsel assert this is not sufficient to establish liability

against the city under the ruling in the case of *Rhyner v. Menasha,* 107 Wis. 201, 83 N. W. 303, where it is claimed a like verdict was held insufficient to show the street was not in a reasonably safe condition for public use. This contention is answered by the court in *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26. In speaking of the question determined in the *Rhyner Case,* it is stated that:

"The court had under consideration a finding in a special verdict that a street was 'defective, or in a dangerous condition, or out of repair;' and it was said, in effect, that such a finding might be true, and the street yet be in a reasonably safe condition for public travel, not insufficient or wanting in repair, which is the test to be applied in measuring a duty of a municipality in caring for its streets under sec. 1339, Stats. 1898. The vice in this question was in several things being stated in the disjunctive when either, or some one of them at least, might exist, and the street be all that the statute required it to be. The court did not decide expressly or by reasonable inference that it is necessary to allege in terms in an action of this kind that the public way involved was not reasonably safe for public use by persons in the exercise of ordinary care, but decided that it must be alleged, proved, and found, in order to support a recovery by the plaintiff, that the public way was in want of repair or insufficient; and that an allegation or finding in that regard in the language of the statute or in the language embodying the judicial construction of the statute is necessary."

In the instant case the court gave the following instruction to the jury in connection with this question in the special verdict:

"If you are of opinion that at the time and place in question the sidewalk was in a reasonably safe condition for travel, your answer to this question will be 'No,' otherwise it will be 'Yes.' "

This instruction informed the jury that in answering the question as they did they must find, in effect, that the defect was such an insufficiency and want of repair making it a highway not reasonably safe for public use. The further

finding of the jury that such defect was the proximate cause of the injury supports this conclusion. In the recent case of *Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105, it is stated in the opinion of Justice WINSLOW:

"That the question of proximate cause is necessarily present in every case of personal injury where the damages are claimed of another by virtue of common-law principle cannot be doubted. No good reason is perceived why the same principle does not apply to cases of highway injuries like the present, although the liability in such cases is based upon statutory provisions."

And further:

"Let it be granted that the duty of the town is to make the highway reasonably safe in fact. The question is, what is the standard to be applied by the jury in determining the question of safety in fact? If the jury be charged that they must determine the question of reasonable safety from all the facts in evidence concerning the condition of the road, must they not necessarily use their own judgment in the matter, and consider in their own minds whether, as reasonable men, they would have anticipated that injury would happen to a traveler? What other abstract test can there be of the reasonable safety of a highway except the test of reasonable liability to cause accident or injury to the traveler?"

In answering the first question the jury finds that the sidewalk was defective, and the answer to the third question finds that the respondent was injured thereon as a natural and probable result of the defective condition, and that the city officers should have anticipated such an injury might result from the defect. This last finding necessarily implies that the sidewalk was not reasonably safe for public use. The findings of the special verdict should be interpreted to harmonize if it is reasonable to do so under the facts and circumstances of the case. The evidence in this case is abundant to support the finding that the sidewalk was not reasonably safe for public use at the time and place in question, and that such defect had existed for a sufficient length of time be-

fore the accident that the city officers, by the exercise of reasonable care, should have discovered and repaired it before it occurred, and that this condition was such that they should have anticipated that it was likely to cause such an injury.

This leads us to the conclusion that the verdict finds facts which constitute a cause of action, and disposes of most of the exceptions preserved to the charge of the court. It may be well to repeat the suggestion of the court made in the *Byington Case* that it would simplify the practice upon this subject to submit the inquiry in the special verdict upon this issue in the form: "Was the sidewalk at the time and place of the injury in a reasonably safe condition for public use?" accompanied by the usual instruction that reasonable safety of a public highway used by persons in the exercise of reasonable care is to be determined under the circumstances of its location, amount of use, and nature of travel thereon, and other circumstances established by the evidence, showing the conditions surrounding the insufficiency complained of. We find no error in the portion of the charge further excepted to by appellant, nor in the refusal to charge as requested by it.

The amount awarded by the jury as damages for the injuries sustained is claimed to be excessive. One of the grounds upon which this part of the verdict is assailed is that the testimony of Dr. Selden, respondent's attending physician, was received and submitted to the jury over objection to his competency. Sufficient facts appear in the record to show that the witness was qualified to testify on the subject to which his evidence was directed, and that it was properly admitted. There is evidence tending to support the contention that respondent sustained quite a severe shock to his nervous system, attended by fever; that he endured much pain and suffering, and a general impairment of health, confining him to his house for about a month; that he was disabled from attending to his daily tasks at

different times before the trial, and required medical attendance and care, for which he incurred a liability of $125. The court directed the jury to allow no damages for future injuries. In the light of this evidence we cannot say that the amount of $750 awarded by the jury is so clearly excessive as to warrant any interference on the part of the court.

By the Court.—The judgment is affirmed.

ELLIS, Appellant, vs. BARRON COUNTY, Respondent.

January 12—February 2, 1904.

Appeal and error: Orders: Judgments: Limitation on time within which appeal can be taken: Practice: Aggrieved party: Dismissal of appeal: Discretionary orders: Review: Supreme court.

1. An order dismissing an appeal to the circuit court from the action of a county board disallowing a claim against the county, is not, in effect, a judgment, and hence an appeal from such an order, taken less than two years but more than thirty days after service of a copy, together with a written notice of its entry, is not taken within the time limited by sec. 3042, Stats. 1898, regulating the time within which appeals may be taken directly from orders.
2. Plaintiff having appealed to the circuit court from the action of the county board disallowing his claim filed against the county, gave an undertaking, substantially the same as one given in another case between the same parties, which the supreme court had held was such a compliance with the statutory requirements as gave the circuit court jurisdiction. On the hearing of a motion, addressed to the circuit court, to dismiss the appeal for defects in the undertaking, plaintiff asked leave to amend, and appealed from an order refusing such application. *Held*, that the undertaking being sufficient, the plaintiff was in no sense aggrieved by the order refusing his application to amend, and hence his appeal from such order should be dismissed.
3. Under sec. 3042, Stats. 1898, declaring that time within which an appeal may be taken directly from an order is limited to

thirty days from the date of the service by either party upon the other of a copy of such order, with a written notice of the entry of the same, the thirty days' limitation does not commence to run against the one party until the other has served the notice therein prescribed, notwithstanding there is service of such order and exception to its entry.

4. When a trial court has, in the exercise of its discretion, power to do or not do a certain act, a refusal to exercise such discretion upon the expressed assumption that it has no such power is an *error of law*, which eliminates from the case the question whether there was any abuse of discretion.

5. In such case, the supreme court, on appeal, will not consider the merits of the question thus addressed to the sound discretion of the trial court.

APPEAL from orders of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Appeal from two orders dismissed; one order reversed.*

This is an appeal from three orders, made under the following circumstances, and which for convenience are numbered consecutively 1, 2, and 3. May 12, 1899, the plaintiff filed a claim against the defendant county to recover back money paid for taxes. November 16, 1899, such claim was wholly disallowed by the county board. February 10, 1900, the plaintiff served notice of appeal from such disallowance, with an undertaking. In April, 1900, the defendant moved to dismiss such appeal on the ground that such undertaking was not equivalent to the "bond" required by sec. 683, Stats. 1898, and particularly that the undertaking did not run "to *Barron county,*" and hence that the court had no jurisdiction. Thereupon, and before the decision of such motion, the plaintiff moved to amend such undertaking by inserting "to *Barron county*" after the word "costs," or to file a new bond. April 11, 1901, the court made an order (No. 1) refusing to allow such amendment or the filing of a new bond for the "sole reason," as therein stated, that the court had "no power" to do so. At the same time—April 11, 1901, the court made another order (No. 2) dismissing the

appeal. March 28, 1902, the plaintiff gave notice of motion to reinstate the appeal, which motion was by written order (No. 3) denied April 9, 1902, for want of "power or authority to grant" the same. March 28, 1903, the plaintiff by one notice appealed from all of the three orders—No. 1, refusing to amend the undertaking; No. 2, dismissing the appeal; No. 3, refusing to reinstate the appeal.

The cause was submitted for the appellant on the brief of *J. F. Ellis,* and for the respondent on that of *J. W. Soderberg,* district attorney.

CASSODAY, C. J. 1. At the time of making the two orders (Nos. 1 and 2) of April 11, 1901, the court made two other similar orders in another case between these same parties, from which the plaintiff appealed to this court. *Ellis v. Barron Co.* 111 Wis. 576, 87 N. W. 552. That case was decided in this court October 15, 1901, and it was held, in effect, that the undertaking given by the plaintiff on the appeal from the county board was a substantial compliance with sec. 683, Stats. 1898, and hence that the circuit court had jurisdiction of the appeal; and accordingly reversed the order dismissing the appeal. Id. The undertaking on the appeal from the county board in this case is substantially the same as the undertaking in that case, which is printed in full on page 577, 111 Wis., 87 N. W. 552. If the appeal from the order (No. 2) dismissing the appeal from the county board were before us on the merits, then that decision would necessarily be controlling. But, as indicated, the appeal from that order was not taken until nearly two years after the order was made. The statute declares:

"The time within which an appeal may be taken directly from an order is . . . limited to thirty days from the date of the service by either party upon the other of a copy of such order, with a written notice of the entry of the same." Sec. 3042, Stats. 1898.

It appears from the records that a copy of that order, with a written notice of the making and the filing and the entry of the same of record in the office of the clerk of the court was duly served upon the plaintiff's attorney August 8, 1901. Thus is appears that the appeal from that order was not taken within the time so limited by the statute quoted, nor until more than a year and a half after the service of such notice. The plaintiff seeks to escape such limitation by claiming that such order dismissing the appeal was, in effect, a judgment; and hence that he had two years within which to appeal therefrom. Sec. 3039, Stats. 1898. But "a judgment is" defined by the statute to be "the final determination of the rights of the parties in the action." Sec. 2882, Id. It is essentially different from such order dismissing such appeal, which this court has repeatedly characterized as an order from which an appeal may be taken under sec. 3069, Id.; *Mason v. Ashland,* 98 Wis. 540, 74 N. W. 357; *Gutta Percha & R. Mfg. Co. v. Ashland,* 100 Wis. 236, 75 N. W. 1007; *Finlay v. Prescott,* 104 Wis. 614, 616, 80 N. W. 930; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 479, 84 N. W. 870. We must hold that such order so dismissing the appeal was not, in effect, a judgment, and hence that the appeal from it was not taken within the time limited by statute.

2. We fail to find in the record any evidence of the service upon the plaintiff or his attorney of any copy of the order refusing to allow the undertaking to be amended or a new bond filed in place of it, much less any written notice of the entry of such order as prescribed by the section of the statute quoted. This being so, there was nothing to prevent an appeal from that order in case it was appealable. As indicated in the former case, the undertaking was held to be a substantial compliance with sec. 683 of the statute, and sufficient to give the circuit court jurisdiction. *Ellis v. Barron Co.* 111 Wis. 581, 87 N. W. 554. By reason of that

being so, it was said in that case that it was "unnecessary to consider the appeal from the order refusing to allow the plaintiff to amend the undertaking." That was on the theory that, the undertaking being sufficient, the refusal of the court to allow an amendment to it was wholly immaterial. The statute only authorizes a judgment or order to be "reviewed upon an appeal by any party aggrieved." Sec. 3048, Stats. 1898; *McGregor v. Pearson,* 51 Wis. 122, 8 N. W. 101; *Day v. Buckingham,* 87 Wis. 219, 58 N. W. 254; *Bragg v. Blewett,* 99 Wis. 348, 74 N. W. 807; *Hogan v. La Crosse,* 104 Wis. 107, 80 N. W. 105. The plaintiff was in no sense aggrieved by the order refusing his application to amend his undertaking, which was so held to be perfectly good.

3. The motion of the plaintiff of March 28, 1902, to reinstate the appeal from the county board was based upon the record and affidavits of the plaintiff and his attorney, to the effect that the record in this case, except as to the amount involved, was "identical in all respects" with the record in *Ellis v. Barron Co.* 111 Wis. 576, 87 N. W. 552; that it was understood and agreed orally by and between the attorneys of the respective parties at the time of making such orders, April 11, 1901, that one appeal to this court would be decisive of both cases, and hence that it was only necessary to take an appeal in one case, and that the other case should abide by the result of the decision in the case which should be appealed; but that the attorney for the defendant declined to abide by such oral stipulation after the decision in this court. In opposition to such motion, and at the time of the hearing, the only attorney for the defendant filed his affidavit to the effect "that he never in any way, shape, or manner stipulated or agreed with the plaintiff's attorney, or any one else, that this action should abide the result of the like action which was" so appealed to this court, and that he "never had the slightest hint of such an understanding until" after such decision was made. On hearing such motion to rein-

state the appeal the trial court, on April 9, 1902, "ordered that the said motion be, and the same hereby is, denied on the ground that the court has *no power or authority* to grant said motion, or to reinstate said appeal at a term subsequent to the term at which said order of dismissal was entered." It appears from the record that the plaintiff's attorney excepted to that order at the time it was made, and admitted service thereof April 10, 1902; but we find no evidence in the record that any "written notice of the entry of" that order was ever served as prescribed in the section of the statute quoted. Sec. 3042, Stats. 1898. This court has repeatedly held that it is only after the service of such notice that the statutory limitation mentioned in that section begins to run. *Corwith v. State Bank of Illinois,* 18 Wis. 560; *Couldren v. Caughey,* 29 Wis. 317; *Orton v. Noonan,* 32 Wis. 220; *Rosenkrans v. Kline,* 42 Wis. 558. The facts are the same here as in the last case cited, in which it was held:

"It is only after *written notice of the entry* of an order that the statutory limitation of the time for appealing therefrom begins to run, and the facts that the order was served upon appellant's attorney and that he filed exceptions thereto do not take the case out of the rule." See, also, *Fatt v. Fatt,* 78 Wis. 633, 48 N. W. 52; *Levine v. Barrett,* 83 Minn. 145, 85 N. W. 942, 87 N. W. 847.

The theory of the statute and these adjudications is that the thirty-days limitation therein mentioned does not commence running against the one party until the other party has manifested an intention to set it in motion by serving the notice therein prescribed. That was not done as to the order in question, and hence the plaintiff was not barred from appealing therefrom.

4. The motion to reinstate the appeal was denied upon the express ground that the court had "no power or authority to grant" the motion at a subsequent term. The motion was made and the order entered within a year after the order

dismissing the appeal. The motion was obviously addressed to the discretion of the trial court, to be exercised as prescribed by the statute. Sec. 2832, Stats. 1898. It could only be granted, if at all, "upon such terms" as that court, in its discretion, might deem to be just and equitable. *Behl v. Schuette,* 95 Wis. 441, 70 N. W. 559; *Mullen v. Reinig,* 68 Wis. 408, 32 N. W. 293; *Port Huron E. & T. Co. v. Clements,* 113 Wis. 249, 257, 258, 89 N. W. 160. The adjudications upon the subject are numerous, and may be found in the notes to the section. See, also, *Buchan v. Nelson,* 114 Wis. 234, 90 N. W. 114; *Platt v. Schmidt,* 115 Wis. 394, 398, 399, 91 N. W. 992. The trial court refused to exercise such discretion for want of "power or authority" to grant the motion. The question presented was whether the oral stipulation between the attorneys of the respective parties was ever in fact made, as claimed on the part of the plaintiff; and, if so, whether the plaintiff relied upon such oral stipulation, and thereby made a case of "excusable neglect," entitling him to relief under the section of the statute cited. *Heinemann v. Le Clair,* 82 Wis. 135, 51 N. W. 1101. Such refusal of the trial court to exercise such discretion and determine such questions was clearly an error of law. Thus it was held by this court many years ago:

"Where a trial court has, in the exercise of a sound discretion in a given case, power to do or not to do a certain act, a refusal to exercise such discretion upon the expressed assumption that it has no such power is an *error of law,* which eliminates from the case the question whether there was any abuse of discretion." *Smith v. Dragert,* 61 Wis. 222, 21 N. W. 46, and cases there cited; *Whitham v. Mappes,* 89 Wis. 671, 62 N. W. 430; *Binder v. McDonald,* 106 Wis. 332, 82 N. W. 156.

This makes it unnecessary to consider the merits of the questions thus addressed to the sound discretion of the trial court, but which that court refused to determine for want of "power or authority." Certainly that court is in a much

better position to determine the truth of the conflicting claims of the parties than this court. The notice of appeal embraces three orders. But one bill of costs will be taxed in this court, and that will be in favor of the plaintiff. *Ellis v. Barron Co.* 111 Wis. 581, 87 N. W. 552, and authorities there cited.

By the Court.—The appeals from the two orders of April 11, 1901, are both dismissed, and the appeal from the order of April 9, 1902, refusing to reinstate the appeal from the county board, is reversed, and the cause is remanded for further proceedings according to law.

SCHMITT, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

January 12—February 2, 1904.

Railroads: Appeal and error: Verdict: New trial: Request for a special verdict: Estoppel: Practice: Newly discovered evidence: Conduct of trial: Argument: Discretion.

1. Where it cannot be said that the evidence and all reasonable probabilities are against a verdict, the ruling of the trial court refusing to grant a new trial because the verdict is contrary to the evidence must be sustained.
2. Where counsel did not make it clear to the trial court, or opposing counsel, that a special verdict was requested, but put his request in such a way that it might easily be misunderstood, and did not correct the misunderstanding when it must have been apparent, he is estopped from claiming, on appeal, that his request was different from that which the trial court understood it to be.
3. All that is necessary to secure the right to the submission of a special verdict is to make oral request therefor at the close of the evidence.
4. A written request commencing, "Now comes the defendant in the above entitled action and moves and requests the court to submit to the jury herein for answer *and as a special verdict* the following questions," together with the facts in connec-

tion therewith, shown by the record, considered, and *held* to be simply a request to submit certain questions.

5. In such case, it is not error to submit a general verdict, and charge the jury generally as to the legal effect of its answers to special questions.

6. A motion for a new trial on the ground of newly discovered evidence is properly denied, where such evidence is in the possession of the party making the motion, and it was clearly his negligence that it was not present at the time of the trial.

7. Where a claim has been fully argued by plaintiff in his opening, the refusal of the trial court to permit defendant to discuss it after plaintiff's closing argument, it being asserted by defendant that plaintiff had therein taken a new position, sustained on appeal.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action to recover the value of certain household furniture and other property shipped by the plaintiff over the defendant's railroad from Spokane, Washington, and consigned to the plaintiff at West Superior, Wisconsin, October 18, 1901, and which was destroyed by fire by the burning of the defendant's warehouse at West Superior at 4:30 a. m., November 10, 1901. The defense was that the defendant was released from liability by the terms of the shipping contract. It appeared by the plaintiff's testimony that at the time of the shipment he received a shipping receipt or waybill for the goods, and that after the fire he delivered it to the defendant's agent at West Superior, with his claim. A paper was produced on the trial, which the defendant claims was the identical receipt or waybill in question. This paper was written in pencil on a printed form, described the goods, acknowledged the receipt of them for carriage and delivery at West Superior, and was properly stamped, but was without signature, save that at the bottom there was a printed signature, "Northern Pacific Railroad, by —— ——, Agent;" and upon the face there had been stamped and written the following words, "Prepaid, $106.80,

to apply H. M. Metzger, Agt." The following words were also written in pencil upon the face: "Released to val. $5.00 cwt." Upon the back of this paper there were printed a large number of conditions and rules, among which was the following:

"8. The corporation will only be liable as warehouseman after the property has been placed in their freight depot. But for loss or damage to property by fire, while in their freight depot or storehouse, the company will not be liable."

One Thunberg, receiving clerk for the defendant company at Spokane, identified this paper as the one which he gave to the plaintiff when the goods were shipped, and told him to take it to the freight office and pay freight thereon. The plaintiff, upon rebuttal, denied receiving any paper from Thunberg except a certificate of the weight of the goods, which he took to the cashier, and claimed that the cashier gave him a waybill or receipt, written entirely by himself. There was also other testimony given by the plaintiff's son, tending to show that the receipt produced in court was not the paper which the plaintiff had, and which he delivered to the defendant's agent. At the close of the evidence the defendant filed a written motion, which, after the title, reads as follows:

"Now comes the defendant in above action, and moves and requests the court to submit to the jury herein for answer and as a special verdict, the following questions, to wit: First. When were the household goods in question received and placed in the freight office of defendant at West Superior? Second. Did the plaintiff use reasonable diligence to remove the household goods from the freight depot after he knew they were there? Third. Were the words, 'Released to val. $5.00 cwt.,' in the bill of lading or receipt when the same was given to the plaintiff at Spokane? Fourth. Did the plaintiff know the words, 'Released to val. $5.00 cwt.,' were in the bill of lading or receipt at the time he received the same at Spokane? Fifth. What was the market value of the household goods at the time they were destroyed?"

The trial court instructed the jury to the effect that there were two pivotal questions in the case: First, whether the paper introduced in evidence was the bill of lading given to the plaintiff when he shipped the goods; and, second, if it was, did the plaintiff have a reasonable time, after he knew of the arrival of the goods at West Superior, to remove them, before the fire? The court further charged the jury that, if they found that the paper introduced in evidence was not the original bill of lading, they should return a verdict for the plaintiff, unless they further found that the plaintiff had a reasonable time to remove the goods after he knew of their arrival. On the other hand, if they found that the paper was the original bill of lading, or that the plaintiff, with reasonable or ordinary diligence, could have removed the goods before the fire, their verdict was to be for the defendant. The court further instructed the jury that, in addition to the general verdict, they were to answer certain questions, the first of which was the first question proposed by the defendant; and, there being no dispute upon that point, the court answered it for the jury. Second, was the second question proposed by the defendant. The third question proposed by the defendant had been stricken out by the defendant's attorney himself. The fourth question proposed by the defendant was stricken out by the court as immaterial. The fifth question proposed by the defendant was stricken out by the court after stating that that was covered by the general verdict, and another question No. 5 was added. The jury thereupon retired, and afterwards brought in a general verdict for the plaintiff, assessing his damages at $1,500, and made the following special answers:

"First. When were the household goods in question received and placed in the freight depot of defendant at West Superior? By the Court: In last days of October or first days of November. Second. Did plaintiff use reasonable diligence to remove the household goods from the freight depot

after he knew they were there? Yes. Third. Were the words, 'Released to val. $5.00 cwt.,' in the bill of lading or receipt when the same was given to plaintiff at Spokane? Stricken out by defendant's attorney. Fourth. Did the plaintiff know that the words, 'Released to val. $5.00 cwt.,' were in the bill of lading or receipt at the time he received the same at Spokane? Stricken out by court. Fifth. What was the market value of the household goods at the time they were destroyed? Stricken out by court. Fifth. Is the bill of lading introduced in evidence the one given to *Mr. Schmitt,* and by him delivered to Mr. W. H. Smith at West Superior? No."

A motion for a new trial was made both on the ground of errors upon the trial and upon the ground of newly discovered evidence, and was denied upon these grounds; but the court, being of opinion that the damages assessed were excessive, ordered a new trial, unless the plaintiff filed a consent to a reduction of the damages from $1,500 to $1,200, which being filed, judgment for $1,200 and costs was entered in favor of the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Louis Hanitch,* attorney, and *C. W. Bunn* and *L. T. Chamberlain,* of counsel, and oral argument by *Mr. Hanitch.*

For the respondent there was a brief by *W. D. Dwyer* and *Geo. C. Cooper,* and oral argument by *Mr. Dwyer.*

WINSLOW, J. The appellant's principal contention is that the finding of the jury to the effect that the bill of lading introduced in evidence was not the one delivered to the plaintiff when the goods were shipped is contrary to the evidence. With this contention we find it impossible to agree. It is true that there was much testimony tending to show that it was the identical bill delivered to the plaintiff, and by him turned over to the defendant's agent after the fire; and it is true also that the plaintiff admitted that upon its face it looked like the bill which he received; but he never admitted

that it was the same bill, and, on the contrary, he testified positively that the bill which he received was a different paper, not written by Thunberg (as was the bill in evidence), but written out in full and signed by the cashier. There was also evidence by the plaintiff's son, who saw and examined the original bill, that the words, "Released to val. $5.00 cwt.," were not upon the original bill. It is not a case where it can be said that the evidence and all the reasonable probabilities are against the verdict; therefore the ruling of the trial court refusing to grant a new trial on the ground that the verdict was contrary to the evidence must be sustained.

It is said that the trial court committed prejudicial error in charging the jury generally as to the legal effect of their answers to certain questions of the verdict. That the court did so charge is indisputable, and if in fact a special verdict was requested, then such general charge and the submission of a general verdict constituted manifest error under the rulings of this court. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 223, 78 N. W. 442. The question is whether a special verdict was requested by the appellant within the meaning of sec. 2858, Stats. 1898, or whether there was simply a request to submit certain issues of fact in addition to the general verdict. If the former, there was error; if the latter, there was no error. This question is not entirely free from difficulty. There was no oral request for a special verdict, but at the close of the testimony the appellant filed a paper entitled in the case and commencing as follows:

"Now comes the defendant in the above action, and moves and requests the court to submit to the jury herein for answer *and as a special verdict* the following questions, to wit."

Here follow five questions which will be found stated at length in the statement of facts. The court then proceeded to submit a general verdict to the jury, and to charge them generally upon the law, and at the close of this general

charge said to the jury that, in addition to the ordinary verdict, they should answer *these questions.* The court then read the first, second, and fourth questions, and, after reading the fourth, said to the defendant's attorney, "I might as well erase that, because they give that in the general verdict." to which counsel said, "Perhaps that is so." and the court thereupon withdrew it. The case then went to the jury without further remark, or any intimation anywhere that a special verdict had been demanded. Upon the hearing of a motion for a new trial the ground was taken that a special verdict had been requested, and that hence the general charge was erroneous; but the trial court, in its order overruling the motion, stated:

"The court holds that no request for special verdict was made; and neither was it treated as a request for a special verdict by the court or counsel at the time of the trial, but that it was rather in the nature of a request for the submission of specific questions to the jury, which questions were submitted to the jury with the exception of one as to the amount of damages, and that question was submitted in the general verdict."

This statement of the trial court as to the manner in which the written request was treated at the time of the trial certainly agrees very well with the facts shown by the record, and it must be accepted as conclusive. We have, then, the fact that neither court nor opposing counsel understood that there had been any request made for a special verdict, but simply a request made for the submission of certain questions; and not only this, but the court indicated this understanding very clearly to appellant's counsel when suggesting that the question as to the value might as well be erased because covered by the general verdict, and counsel assented to the suggestion, though he must have clearly seen that this could not rightly be done if the verdict were in fact a special verdict. What should be the rule when it appears that there has been misapprehension of this kind by court and counsel?

We can have no doubt that where the counsel did not make the nature of his request clear, but put it in such a way that it might easily be misunderstood, and did not correct the misunderstanding when it must have been apparent, he must be held to be estopped from now claiming that his request was different from that which the court understood it to be. It was very easy to request a special verdict in a way that could not be misunderstood. All that it was necessary to do was to rise at the close of the evidence, and say that the defendant requested a special verdict, and the right was secured. To pass to the court a paper containing a number of questions, with a written statement at the head to the effect that the defendant requests that the questions be submitted to the jury for answer and *as a special verdict,* would doubtless be sufficient if the court read the statement; but in the hurry of the trial it might easily be that the trial court and opposing counsel would entirely overlook the opening paragraph as simply a formal clause, and confine their attention to the questions themselves. When it is so easy to make the request in a way which cannot be misunderstood, what justification is there for making it in delphic language, or concealing it in unexpected places? We can see none, and we hold in the present case that the request must be treated as the trial court understood it—i. e., as simply a request to submit certain questions—and hence that the general charge and verdict was not error.

There are no other serious questions in the case. A motion for new trial on the ground of newly discovered evidence was made and overruled, and this ruling is claimed to be error, but it is plain that the ruling was correct. The supposed newly discovered evidence consisted of an alleged written release of the defendant from liability for destruction of the property by fire and other causes, given by plaintiff when he shipped the goods at Spokane. It is sufficient to say that this release was in possession of the defendant from

the time it was given, and it was clearly the defendant's own neglect not to have it present at the time of the trial.

At the end of the plaintiff's closing argument to the jury the defendant's attorney requested that he be allowed to argue the fifth special question to the jury, because he claimed that the position taken by plaintiff that the bill of lading in evidence was not the one received by him, but a substituted paper, was a new one, and had not been argued. The court, however, declined the request on the ground that the position had been fully argued by the plaintiff in his opening, and the ruling must be sustained. The conduct of the argument of a case is one peculiarly within the province of the trial judge to regulate, and the cases are rare where this court will interfere.

By the Court.—Judgment affirmed.

BEARDSLEY and another, Appellants, vs. SCHMIDT and another, Respondents.

January 13—February 2, 1904.

Factors: Principal and agent: Sales by factor: Real party in interest: Trustee of express trust.

1. "An agent employed to sell, or to purchase and sell, goods or other personal property intrusted to his possession, for commission, is a factor."
2. It is not essential to the relation of an agent to his principal in respect to the latter's property, that it should have been consigned directly to him by such principal, in order to give such agent the status of a factor. It is only necessary that the agent shall be possessed of the property with authority from the principal to sell the same on commission.
3. By common-law principles a factor has a special property in goods intrusted to his care and in the proceeds of a sale thereof, from which, by implication, arises authority to sell the property in his own name, and to likewise sue to recover the purchase price.

4. As between a factor and his vendor, the former is the owner of the subject of the sale and real party in interest to sue to recover the purchase price, that not being affected, necessarily, by whether the name of the principal is disclosed to the vendee before the sale, or the terms of the sale are submitted to the principal for approval, or the sale is in fact made in the name of the factor.
5. A factor or person possessed of the goods of another and authorized in respect thereto to make a contract for the benefit of his principal, is trustee of an express trust under sec. 2607, Stats. 1898, and authorized thereby to enforce it in his own name, whether so made or not, such statute expressly providing that he shall be such trustee if the contract is *made with him* or in his own name.
6. Whether the right of a factor to sue in his own name be referred to common-law principles or the statute mentioned, the principal may control the litigation, saving the rights of the factor, unless the latter's legitimate charges against the subject of the action exceed the amount recoverable.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action to recover the purchase price of a quantity of cement claimed to have been sold by plaintiffs, as factors, to defendants. The defendants answered, among other things, that plaintiffs were not the real parties in interest. The cause was disposed of wholly on that issue. The evidence in respect to the matter was to this effect: Plaintiffs, as warehousemen, received the cement from the Eastern Minnesota Railway Company at West Superior, Wisconsin. Walter T. Bradley & Co., of Philadelphia, were the owners thereof. Some time subsequent to the commencement of plaintiffs' possession of such property, they ratified the former's employment as warehousemen, and paid storage charges on such property. The business of plaintiffs, in part, was that of commission merchants. Some time after they took the property as warehousemen, the owners authorized them by letter to find a market for the cement, and to

dispose of it in large lots if possible, otherwise in small quantities, and to account to such owners from month to month. Some time thereafter such owners informed plaintiffs by letter that their idea was that the latter should take the cement for sale on commission, with authority to use their own judgment as to the best obtainable price. Thereafter defendants made an offer to plaintiffs for the cement, and were informed that it would have to be submitted to the owners. It was so submited, resulting in such owners advising plaintiffs by telegram to accept. The two letters and the telegram referred to constituted all the authority plaintiffs had to make the sale. The name of the owner of the cement was not disclosed in the negotiations leading up to the sale, nor in the consummation thereof. After the telegraphic advice aforesaid, plaintiffs accepted defendants' offer and thereafter the cement was delivered to them in three lots, each being receipted for to plaintiffs in their own names. Thereafter the goods were billed to defendants in plaintiffs' name as the creditors. At the commencement of this action there was owing to plaintiffs their charges for storing the cement for a considerable period of time, and for selling the same.

At the close of plaintiffs' evidence defendants moved the court to dismiss the complaint. Thereupon the court made findings in accordance with the foregoing, and decided thereon that plaintiffs were not the real parties in interest in respect to the claim involved, and were not entitled to maintain the action, and that defendants' motion for a dismissal of the action with costs should be granted. Judgment was ordered accordingly, and was so rendered.

For the appellants there was a brief by *Luse, Powell & de Forest,* and oral argument by *L. K. Luse.*

For the respondents the cause was submitted on the brief of *Archibald McKay.*

MARSHALL, J. This appeal is governed by a few familiar principles. The trial court seems to have decided the case upon the theory that since appellants were agents for the owners of the cement in making the sale, the latter are the real parties in interest to enforce payment for the property by judicial proceedings. Counsel for respondents concedes that if appellants were factors and exercised the implied authority incident to such character to sell the property, and made the sale in their own names, they are the real parties in interest to enforce collection of the indebtedness. That has often been ruled by this and other courts, and, indeed, is elementary, and that too without the element, necessarily, of a sale in the name of the factor. *Price v. Wisconsin M. & F. Ins. Co.* 43 Wis. 267; *McGraft v. Rugee,* 60 Wis. 406, 19 N. W. 530; *Edgerton v. Michels,* 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; *Kellogg v. Costello,* 93 Wis. 232, 67 N. W. 24; *Delafield v. Smith,* 101 Wis. 664, 78 N. W. 170; *McCobb v. Lindsay,* 2 Cranch, C. C. 215, Fed. Cas. No. 8,704; *Graham & Co. v. Duckwall,* 8 Bush, 12; *Miller v. Lea,* 35 Md. 396; *Hearshy v. Hichox,* 12 Ark. 125; 8 Ency. Pl. & Pr. 829; Mechem, Agency, § 1039; Story, Agency, § 112; Reinhard, Agency, § 453. This implied authority of the factor to sell in his own name and to maintain an action in his own name to recover the purchase price grows out of the fact that the nature of the relations between the principal and the agent, and the latter and the purchaser, are such that, as between the two latter, the agent is deemed to be the owner of the property. He has, as against his principal, in the absence of some stipulation to the contrary, a special interest therein and the proceeds thereof, and the right to control the same till he receives his compensation for services rendered in respect thereto. Story, Agency, § 111. He is also, as to the principal, deemed to be a trustee of an express trust under the provisions of the statute (sec. 2607, Stats. 1898; Reinhard, Agency, § 453; 8 Ency. Pl.

& Pr. 829, note 1; *Wolfe v. M. P. R. Co.* 97 Mo. 473, 11 S. W. 49; *Considerant v. Brisbane,* 22 N. Y. 394; Bliss, Code Pl. 59), and as such is authorized to sue for the purchase price by the exception to sec. 2605, Stats. 1898. Sec. 2607, Id., provides:

"A trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

In either case the principal can control the litigation if he sees fit, subject to the due protection of the factor's special interest, unless such interest, consisting of legitimate charges against the property, or the proceeds thereof, are equal to or in excess of the amount recoverable. Reinhard, Agency, § 453; 12 Am. & Eng. Ency. of Law (2d ed.) 691. It is not essential to the right of the factor to sue in his own name that he shall sell in his own name, as counsel seems to think, basing his faith on *Price v. Wisconsin M. & F. Ins. Co.* 43 Wis. 267. It is there said: "A factor selling goods for his principal in his own name, can sue in his own name for the price," citing Story, Agency, § 110. That text of Story contains no such restriction,—in fact contains nothing about the right of the factor to sue in his own name. It seems it was inadvertently referred to in a way likely to mislead. What the author says on the subject is contained in sections 34, 11, 110, 111, and 112, and is to the effect that a factor has implied authority to sell in his own name and to sue in his own name for the purchase price of the property sold, subject, however, to the right of the principal, as before stated, to control the litigation if he sees fit, so far as his own interest is concerned. The right to sue is not put in the conditional in Story; neither is it in the cases decided by this court since *Price v. Wisconsin M. F. Ins. Co.*

supra; Edgerton v. Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; *Kellogg v. Costello,* 93 Wis. 232, 67 N. W. 24. By force of the statute alone, as we have seen, a factor has the right to sue in his own name. That appears sufficiently from the plain language quoted. Moreover, that is the meaning attributed to similar statutes elsewhere, as will be seen by referring to the cited cases. That is not referred to in the previous decisions of this court, except in *Robbins v. Deverill,* 20 Wis. 142, where nothing definite was said. Since that case was decided it has become well recognized that the code provision had for its purpose, in part, the preservation of the old practice as to factors. Bliss, Code Pl. 59. It must not be understood that a factor is a trustee of an express trust in the strict sense of the term. He is such under sec. 2607, Stats. 1898, because there in effect so declared. That subject will be found fully discussed in *Considerant v. Brisbane, supra.*

If it was essential to the right of plaintiffs to sue in their own names that they should have sold in their own names, it seems that the evidence in the record is conclusive in their favor. The owners of the property were not mentioned in the negotiations leading up to the sale, nor in the consummation thereof, while the names of appellants were used on every occasion for using the name of any one on the side of the sellers.

The only question left to be determined, in any view, is: Did appellants handle the property as factors? A factor is said to be "an agent employed to sell or to purchase and sell goods or other personal property intrusted to his possession, . . . for a compensation commonly called factorage or commission." *McGraft v. Rugee,* 60 Wis. 406, 19 N. W. 530. "An agent who, for a commission, sells goods for his principal, which the latter has consigned to him." Reinhard, Agency, § 449. That seems to accurately describe the situation of appellants in respect to the property in question,

beyond reasonable controversy. True, it was received by them from the railway company, but they were brought into contractual relations with the owners thereof thereafter, and acted by express authority from the latter, "to take and handle the property on commission." The fact that respondents' proposition to purchase the property was not acted upon by appellants without submitting the same to the owners of the property for approval is without significance. Possession of the property, with authority to sell it in the capacity of commission merchants, made them factors, with the implied authority incident thereto, and also made them trustees of an express trust with the right to bring this suit, regardless of whether they received the property directly from the owners, or whether the sale was required to be made upon approval of the owners, or whether the same was so made, or whether they did or did not at the time of the sale disclose the names of the owners. *Ilsley v. Merriam,* 7 Cush. 242. As soon as appellants assumed in regard to the property the status of commission merchants, they acquired a special interest therein which was increased by the continuance of their possession and their services in making the sale, giving them the right, within all the authorities, to bring this action and to control the litigation, since there is nothing to indicate that such control is contrary to the wishes of the owners of the property. It follows that the judgment appealed from must be reversed.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

BAIN, administrator, Appellant, vs. NORTHERN PACIFIC RAILWAY COMPANY, Respondent.

January 13—February 2, 1904.

Railroads: Negligence: Personal injuries: Cause of action, local or transitory? Dangerous place to work: Duty to warn: Court and jury: Fellow servants: Contributory negligence: Assumption of risk.

1. A cause of action is not changed in character by reason of statutory regulation or modification of the circumstances out of which it would arise at common law, unless such statutes are penal.
2. A cause of action for personal injuries is not local, and the person liable therefor may be pursued in any jurisdiction where he may be found.
3. The mere fact that a cause of action for personal injuries could not exist under the rules of the common law without the aid of the statutes of another state, is no obstacle to recovery thereon in the courts of Wisconsin.
4. The moving of railroad cars by a locomotive on a warehouse track, where the space between the side of an ordinary car and the warehouse is only about fifteen inches, is such dangerous business as to arouse the duty of the railway company to promulgate regulations requiring warning to be given by the employees in charge whenever such cars are to be moved.
5. In such case, where there was some evidence that no regulations requiring notice or warning of the purpose to move cars on the warehouse track had ever been proclaimed by defendant, and that employees in and about the warehouse were likely to be imperiled by a sudden and unannounced movement, it is error to direct a verdict for the defendant.
6. Defendant maintained a track at Duluth, Minnesota, alongside of a warehouse on which plaintiff's intestate was employed as a mason in building part of the wall of the warehouse, the wall being about fifteen inches from the side of an ordinary car standing on such track. When deceased went to work the cars on the track were stationary and not attached to any locomotive, but the cars being suddenly and violently set in motion by defendant's engine, deceased was crushed between the warehouse and a car of more than ordinary width, and killed. There was evidence tending to show that defendant's employee, charged with duty and control of the removal of

these cars, before setting them in motion, passed through the warehouse, spoke to decedent and his helpers, and observed their surroundings. *Held:*

(1) That the jury, if convinced of such facts, might have found defendant's employee guilty of negligence.

(2) That liability for such injury arose from a "risk or hazard peculiar to the operation of railroads," under secs. 2071, 5913, Gen. Stats. Minn. 1894, permitting recovery for injuries resulting from the negligence of fellow servants.

(3) That it was error to direct a verdict for defendant.

7. In such case, on the evidence, it is *held* that the question of decedent's contributory negligence, and whether he assumed the risk, should have been submitted to the jury.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The defendant maintained at Duluth a covered dock or warehouse extending out easterly into the waters of the bay. Same was about 1,000 feet long east and west, the north side fronting upon a slip in which vessels entered, and along the south side were maintained two tracks, onto which cars were run for the purpose of delivering freight into the warehouse to be transferred to boats, or receiving freight from the warehouse. The floor of warehouse was about four feet above these tracks, and the same height as car floors. At the time of the events involved it was customary to move such cars in and out seven or eight times a day, at intervals of approximately an hour. The plaintiff's decedent was a mason foreman, and was engaged in the work of building a transverse fire wall across this building at a point about 600 feet east from its shore end. He and his assistants had built that wall up to the level of the floor of the building from the foundation about four feet below, commencing at the north side of the building and working southerly, of course standing in the unbuilt space and working backward. The day before the injury the wall had been completed up to the height of the floor to the extreme south side of the building, except that about two feet of the wall had been built upward to

within only about two feet of the level of the floor, and thence sloped northward perhaps another two feet. Before completing the wall it was necessary to remove a post in the south side of the building at the spot where the wall must cut through. At seven o'clock in the morning of the 29th of April, 1902, the decedent and his assistants proceeded to remove that post and to shore up the roof, whereupon the decedent took his stand outside of the south wall of the building, and proceeded to build up the end of the brick partition wall. At that time there was standing upon the track, whose nearest rail was only about three feet from the south side of the building, a number of freight cars, with no engine attached to the same, such cars having been in place since the night before. The car opposite the end of the partition fire wall was an ordinary freight car, and left a space about fifteen inches between its side and the side of the building in which decedent must stand. While he was thus engaged, and at about half past seven in the morning, an engine was backed down against these cars with much force, and they propelled eastward at a speed variously described as from two to five miles an hour. The second car westward of the deceased was a very much wider car, so that it left a space of only seven to ten inches between it and the building. Decedent was caught by the side of that car, rolled along, and crushed against the side of the building, so that he died shortly afterwards. There was no proof of any regulation promulgated by the defendant for giving notice or warning when cars standing beside this warehouse were to be moved. There was proof that no warning was given on this occasion—such, at least, as could reach the decedent and be of any effect—although the engineer testified that he was sure he rang his bell some 600 or 700 feet away, as he uniformly did. There was evidence that the deceased had been engaged in this work a week or ten days, so that he had opportunity to observe the frequency with which the cars on this track were moved, but

no evidence that he had any knowledge as to either regulation or custom to give warning of such movement. At the close of the trial defendant moved the court to direct a verdict for the defendant "on the ground that the evidence does not show facts sufficient to constitute a cause of action. The evidence shows that the deceased was guilty of contributory negligence, and assumed the risk of the injuries that he was exposed to." The motion was granted, and upon such verdict judgment for the defendant entered, from which the plaintiff brings this appeal.

For the appellant there was a brief by *Luse, Powell & de Forest,* and oral argument by *L. K. Luse.*

For the respondent there was a brief by *Louis Hanitch,* attorney, and *C. W. Bunn* and *Emerson Hadley,* of counsel, and oral argument by *Mr. Hanitch.*

DODGE, J. This cause of action depends for its existence upon statutes of Minnesota, certainly upon sec. 5913, Gen. Stats. Minn. 1894, which covers the same general field, and in general effect is the same as sec. 4255, Stats. 1898, both being in adoption of the English legislation of 1846 known as "Lord Campbell's Act" (9 & 10 Vict. 93); the Minnesota statute, however, by construction, conferring the right of recovery although the beneficiary be an alien. *Renlund v. Commodore M. Co.* (Minn.) 93 N. W. 1057. Possibly the right of action also depends on sec. 2701, Gen. Stats. Minn. 1894, imposing liability on railway corporations for injuries to their employees by negligence of a coemployee. This statute in terms imposes liability to any employee injured, without contributory negligence, by the negligence of any coemployee, without limitation as to the character of either the employment or the risk; but in its application it has been construed by the supreme court of Minnesota as imposing such liability only for injuries resulting from exposure to hazards peculiar to the repair and operation of railroads

(*Nichols v. C., M. & St. P. R. Co.* 60 Minn. 319, 62 N. W. 386; *Mikkelson v. Truesdale,* 63 Minn. 137, 65 N. W. 260), so that it corresponds very closely with the provisions, and certainly with the general policy, of ch. 448, Laws of 1903. That causes of action for personal injuries by negligence are transitory, and not local, so that they may be enforced in any *forum* where personal jurisdiction of the parties can be acquired, is elementary, and supported by unanimous consensus of authority. There is, however, some exception to that unanimity where the cause of action results from statutes marking more or less violent departure from the policy of the common law. Still the great weight of authority is in support of the view that the cause of action is not at all changed in character by reason of statutory regulation or modification of the circumstances out of which it would arise at common law, so that such statutes are not penal; that, existing a cause of action for personal injuries, the same is not local, and the person liable therefor may be pursued in any jurisdiction where he may be found. *Dennick v. Railroad Co.* 103 U. S. 11; *Texas & P. R. Co. v. Cox,* 145 U. S. 593, 12 Sup. Ct. 905; *Stewart v. B. & O. R. Co.* 168 U. S. 445, 18 Sup. Ct. 105; *Whitman v. Oxford Nat. Bank,* 176 U. S. 559, 20 Sup. Ct. 559; *Leonard v. Columbia S. N. Co.* 84 N. Y. 48; *Wooden v. W. N. Y. & P. R. Co.* 126 N. Y. 10, 26 N. E. 1050; *Higgins v. C. N. E. & W. R. Co.* 155 Mass. 176, 29 N. E. 534; *Walsh v. N. Y. & N. E. R. Co.* 160 Mass. 571, 36 N. E. 584; *Chicago, St. L. & N. O. R. Co. v. Doyle,* 60 Miss. 977; *Missouri P. R. Co. v. Lewis,* 24 Neb. 848, 40 N. W. 401; *Knight v. W. J. R. Co.* 108 Pa. St. 250; *Herrick v. M. & St. L. R. Co.* 31 Minn. 11, 16 N. W. 413; *Nicholas v. B., C. R. & N. R. Co.* 78 Minn. 43, 80 N. W. 776; *Eingartner v. Illinois S. Co.* 94 Wis. 70, 79, 68 N. W. 664; *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707. The cases usually cited as in conflict with the foregoing general rule are *Richardson v. N. Y. C. R. Co.* 98 Mass. 85;

Woodard v. M. S. & N. I. R. Co. 10 Ohio St. 121; *McCarthy v. C., R. I. & P. R. Co.* 18 Kan. 46; *Anderson v. M. & St. P. Railway,* 37 Wis. 321. Of these the first three are addressed to the new cause of action in favor of personal representatives of a deceased in trust for certain relatives, created by Lord CAMPBELL'S act and its successors in various states. While they suggest doubt as to the transitoriness of a purely statutory cause of action, they turn mainly on the consideration that, in addition to creating a cause of action, such statutes also constitute a trustee to recover upon it, and prescribe his duties as to distribution of its fruits, which it is forcibly argued are allowed extraterritorial effect if an administrator appointed in another state may take and enforce the trust. Later cases in Massachusetts have effectually "trimmed" the *Richardson Case* to that consideration alone. The argument is, we confess, a cogent one, which might well give us pause, especially where the beneficiaries differ under the respective laws of the place of injury and of the *forum.* We have nevertheless concluded that we should yield to the great preponderance against its effectiveness of decisions of the courts of sister states, and also of the supreme court of the United States, to which we have already declared a general policy of adherence in case of conflict between state courts. The remaining case, a decision of our own court, relating to a cause of action under the coemployee statute of Iowa, is so out of harmony with all decided cases in its reasoning, though perhaps not in the result reached, that it demands more than passing mention. That case rests upon the major premise that a personal action for a personal injury is governed by the *lex fori,* and not by the *lex loci,* as to the existence and validity of the right of action. This general proposition is so opposed to most elementary principles of law that we at once turn with interest to the authorities cited to support it, namely, *De la Vega v. Vianna,* 1 Barn. & Ad. 284; *Scoville v. Canfield,* 14 Johns. 338, and *Pearsall v. Dwight,* 2 Mass.

84. We find that they utterly fail to do so, but, on the contrary, contradict it so far as they speak on the subject. In *De la Vega v. Vianna* the question was whether the debtor could be arrested in England under judgment upon a contract made abroad, when the law of the place of contract did not permit such process. The court held he could not escape for that reason; that arrest was only matter of remedy, over which the law of the *forum* controlled, approving impliedly the view that, as to the existence of the right of action, the validity and construction of the contract, the *lex loci* was paramount. *Scoville v. Canfield* held merely that a penal statute could not be enforced by the courts of another state, nor statutes affecting merely the remedy, and not the right. *Pearsall v. Dwight* denied controlling effect to a foreign statute of limitations going only to the remedy, but also declared the elementary rule of law that as to the existence and validity of a personal, transitory right of action, the laws of the place where it arose must be given effect, subject, of course, to the condition that the public policy of the place of suit be not outraged thereby. This rule has the full sanction of this court in *Seamans v. Knapp-Stout & Co. Co.* 89 Wis. 171, 61 N. W. 757; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Brown v. Gates, ante,* p. 349, 97 N. W. 221. The general rule declared in the *Anderson Case* has been repudiated in those last cited, as also in *Eingartner v. Illinois S. Co.* 94 Wis. 70, 68 N. W. 664, and *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707; in the former in its application to a right of action arising under the rules of merely the common law; in the latter with reference to a right depending on statutes of another state like those existing in Wisconsin. In no other case in this state has the rule stated in *Anderson v. M. & St. P. Railway,* been followed or reaffirmed. We cannot avoid the conclusion that the statement that a personal right of action for a personal injury is governed by the *lex fori,* as applied to anything but the man-

ner of enforcement, was inconsiderately made, and should be corrected, to the end that it may not stand in our Reports in apparent conflict with the law as recognized everywhere else, and as applied by this court in at least tacit repudiation of that statement. That case may doubtless stand as authority for what was in fact decided, namely, that the courts of this state may refuse to enforce even a personal cause of action which depends on the statute of another state radically different from the law in this, and repugnant to our public policy. So restricted, it presents no obstacle to the present action, depending on statutes of Minnesota of which practical counterparts exist here, and which therefore are entirely in accord with the public policy of Wisconsin as declared by its legislature. We conclude, therefore, that the mere fact that the cause of action now sued on could not exist under the rules of the common law without the aid of the Minnesota statutes above cited is not an obstacle to recovery thereon in the courts of this state.

2. The direction of a verdict for defendant might be sustained either if there were no evidence of negligence on the part of defendant or its employees, or if the evidence conclusively showed that plaintiff's decedent was guilty of contributory negligence, either by specific act or by assumption of the risk from which he suffered. Of those in their order. Two phases of negligence on the defendant's part are urged: The first, that of the defendant itself, in that the company had failed to prescribe any regulations requiring such warning to be given before moving cars on these warehouse tracks that employees in peril of injury thereby might have opportunity to escape. There can be no doubt of the duty of a master who conducts a dangerous business by means of numerous employees to promulgate regulations requiring warning to be given of the doing of acts by some likely to injure others in absence of such warning. *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, 63 N. W. 90; *Portance v. Lehigh*

Valley C. Co. 101 Wis. 574, 578, 77 N. W. 875; *Hartvig v. N. P. L. Co.* 19 Oreg. 522, 25 Pac. 358; *Lake Shore & M. S. R. Co. v. Murphy,* 50 Ohio St. 135, 33 N. E. 403; *Ford v. L. S. & M. R. Co.* 124 N. Y 493, 26 N. E. 1101. That the moving of cars by locomotive engines in a yard where others may be endangered thereby is such dangerous business as to arouse this duty could hardly be questioned, but, in any event, is settled by *Promer v. M., L. S. & W. R. Co., supra.* There was at least some evidence in this case that no regulations had ever been proclaimed by defendant requiring notice or warning of the purpose to move cars upon this warehouse track. There was also evidence that employees in and about the warehouse were likely to be imperiled by a sudden and unannounced movement. Such employees were liable at any time to be passing from warehouse to car in their work, or across the track, even between the cars, to reach the accommodations provided for calls of nature. Obviously, too, if any repairs needed to be done to the south side of the warehouse, the workmen must be, as deceased was, between the side of the building and the track. It seems plain, therefore, that the jury might well have been justified in finding that the situation was such as to impose on the company this duty of ordering that warning or notice be given, whenever cars on this track were to be changed from inert structures dangerous to no one into a moving railroad train, and that such duty had not been performed.

The other phase of negligence claimed to make defendant liable is that of the employee charged with the duty and control of the removal of these cars, and who caused the movement which injured the deceased. The evidence as to his conduct is conflicting, but there is testimony tending to prove that he passed through the building from end to end to see that no "toe boards" or skids were in place between the floor of the warehouse and the cars; that he saw and spoke to decedent and his helpers; that at that time one of the gang was

down in the space between building and cars, and that the shape and condition of the wall was such that any reasonable man must assume that whoever was going to build up the south end of it to the same level as the rest would in all probability stand where did the deceased when hurt. If the jury were convinced of such facts, we are clear that they might also have found that this man was negligent in starting the cars rapidly to the eastward without either warning these masons or assuring himself that they were not in the place of peril. This, if found, would perhaps have been merely negligence of a fellow servant of defendant, but, under the statute of Minnesota above mentioned, would have resulted in liability if the injury arose "from a risk or hazard peculiar to the operation of railroads." That it did so arise is obvious. If anything is peculiar to the operation of railroads, the moving of a train of freight cars is.

3. Thus we are brought to consider the question of contributory negligence, including assumption of the risk from which the injury resulted. The contention of respondent is that deceased was guilty of negligence in undertaking to stand between the building and the track to build up the south end of this wall, when he might have stood within the building, and built the south end first, and thence inward. The evidence can hardly be considered conclusive that this method was feasible—certainly in the stage and shape which the wall had reached on the morning in question; but, laying that doubt to one side, we are clear that it cannot be held negligence in law to take a position in such proximity to a stationary and detached freight car that, if it is set in motion without notice, injury is probable, when one has no knowledge of any custom to move it without warning. Such a car presents nothing of peril in its then condition. It is as harmless as a farm wagon, or, indeed, as a building, *per se.* *Luebke v. C., M. & St. P. R. Co.* 59 Wis. 127, 17 N. W. 870; *Maguire v. F. R. Co.* 146 Mass. 379, 15 N. E. 904.

If, as the jury might have found, the situation imposed a duty of warning upon the master, the workman may well without negligence assume that such duty will be performed unless he has knowledge of absence of such regulation or of a different custom. There is no direct evidence that deceased had any knowledge either of lack of regulation or of custom to move cars without precaution, by way of warning or otherwise, to prevent injury to those about the warehouse exposed to danger. The utmost extent of proof is that he had been at work for a week or more in or under this warehouse, and might have observed what the custom was. Whether he did so, or, under all the circumstances, must, in the exercise of ordinary care, be presumed to have done so, involves inference by no means so clear and certain as to warrant affirmative answer by the court. The burden of proof was upon the defendant, and we are not prepared to hold that the facts necessary to charge deceased with contributory negligence in placing himself in the place and position of injury are established beyond controversy.

Substantially the same considerations apply to the claimed assumption of the risk. Deceased, of course, assumed the risk resulting from such facts as he knew and such as were obvious to ordinary care and prudence. He undoubtedly assumed any risk from the proximity of the stationary cars, but he did not assume the risk of the cars being set in motion without warning, unless he knew, or ought to have known, there was some likelihood of such event. That he had any such knowledge or means of knowledge was, as already stated, not established beyond controversy.

Respondent further urges that, even after the cars were set in motion, decedent might have escaped from his position and into the building before the wide car reached and crushed him. As to his opportunities and conduct, the evidence is confused. The only feasible means of escape were either stepping up some twenty-two inches onto the wall he

was building and squeezing through a thirteen-inch orifice in the side of the warehouse, or climbing into one of the doorways on either side of him at an elevation of four feet, and this within a space of only thirteen or fifteen inches between the side of the building and the moving freight car. The evidence discloses that he was not directly in front either of the thirteen-inch space or of a door at the moment the cars started, but was reaching over to the right of the former, trowel in hand, for mortar, about three feet away. There is uncertainty in the evidence as to how far away was the wide car, how rapidly the train moved, and how soon deceased was reached and struck by the wide car. One witness is very certain that it was almost momentarily after the shock of the coupling engine, and before decedent had time to straighten up from his reaching after mortar. When the impact of the engine came, and wholly unexpectedly these cars were changed to a moving railway train, so close to the side of the building that only by crowding against it could he avoid contact with the cars, there was obviously such a situation of surprise and sudden peril that one might well be free from imputation of negligence merely because he did not select the best method of escape. *Schultz v. C. & N. W. R. Co.* 44 Wis. 638, 644; *Berg v. Milwaukee,* 83 Wis. 599, 602, 53 N. W. 890. In such state of the evidence the question of decedent's negligence was for the jury.

From all that has preceded, our conclusion is obvious that the circuit court should have submitted to the jury the questions of defendant's negligence and of contributory negligence on the part of plaintiff's decedent, including assumption of the risk, and that error was committed in directing verdict for the defendant.

By the Court.—Judgment reversed, and cause remanded for a new trial.

DOUGLAS COUNTY, Respondent, vs. SOMMER, Appellant.

January 13—February 2, 1904.

County board: Power to adjourn annual meeting: Sheriffs: Compensation: Illegal allowance: Action to recover: Money had and received: Discount on county orders: Damages.

1. County boards have power to adjourn their annual meetings, for any reasonable and sufficient grounds, both as to time and place of adjournment.
2. A county board having power by statute to fix the salary of the sheriff of the county, may exercise that power at an adjourned session of its annual meeting.
3. An action in the nature of an action for money had and received can be maintained by a county against a sheriff to recover money paid to and received by him, in good faith, under a mistake of the law by all the interested parties.
4. Where a sheriff's compensation was by salary in lieu of all fees and compensation for services within his county, except for keeping and maintaining prisoners in the county jail, an allowance and payment to the sheriff of items for street car and railway fare of prisoners, in transporting them to and from the county jail, workhouse and the courts is unlawful, and the county can recover such amounts from the sheriff.
5. In an action against a sheriff to recover moneys illegally paid to him, it is error to include in the recovery against the sheriff items paid to a deputy sheriff under the sheriff's appointment, where the claim was presented to the county board in the deputy's name, and was audited, allowed, and county orders issued to the deputy, and paid to him personally.
6. To allow and pay a sheriff for services and disbursements in apprehending and returning fugitives from justice from without the state, without obtaining the certificate required by sec. 2, ch. 126, Laws of 1901, before the services were rendered, and for services in the unsuccessful pursuit of fugitives from justice within the state outside the sheriff's county, without having the certificate of the district attorney required by subd. 34, sec. 731, Stats. 1898, and without proof before the county board that the escape or pursuit were not the result of, or made necessary by the sheriff's carelessness or negligence, is an abuse of power by the county board, and their action is void.
7. Where, in an action on implied *assumpsit* by a county against

a sheriff to recover sums of money illegally paid him, it appeared that he had been paid in county orders, worth ninety per cent. of their face value, and that the sheriff realized only that amount thereon, the measure of recovery is the amount of money actually received by the sheriff, and not the face value of the county orders. SIEBECKER and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Modified and affirmed.*

Action by *Douglas County* to recover amounts paid to defendant for compensation as sheriff on bills presented by him and paid by the county, for which it is alleged the county is not liable. Defendant denied all liability, and claimed that the amounts were properly allowed him, as sheriff of the county. The action was referred to Louis Hanitch, as referee, to hear, try, and determine. On the evidence produced before the referee, he found the following material facts: *William J. Sommer,* the defendant, was duly elected sheriff of *Douglas County* November, 1900, and qualified as such January 7, 1901, and continued in office until the expiration of the term, January 5, 1903. The county board passed a resolution at its meeting November 7, 1895, providing for compensation of the sheriff for all services to be performed within the county, changing the method of payment from that of the fee system to a fixed salary, and this compensation was to be in lieu of all fees and compensation for the sheriff, his deputies and undersheriff, rendered within the county, except compensation for the keeping and maintaining of prisoners in the county jail; this resolution to go into effect January, 1897. The county board met in annual session November 12, 1895, which was adjourned from time to time, by recesses and adjournments of from one to six weeks, until February 5, 1896. Special meetings were held between adjournments of the annual meeting. On December 19, 1895, at an adjourned meeting of the annual meet-

ing, the board met at ten o'clock, pursuant to order, and the chairman declared a recess until two o'clock p. m. the same day. Nothing appeared to show a majority of the board were present when recess was taken in the forenoon, but a majority was present in the afternoon, when its session was resumed, and an adjournment was ordered to February 5, 1896. At the session of February 5, 1896, a resolution was introduced fixing the salary of the incoming sheriff at the rate of $1,500 per annum, under the resolution compensating the sheriff by salary in lieu of the fee system. At an adjourned meeting of the board on March 16, 1896, this resolution was adopted by an affirmative vote of the board, with only one dissenting vote. At an adjourned session of the annual meeting, December 1, 1896, the board authorized the sheriff to appoint two deputies to act as bailiffs of said county, and allowed the sheriff $1,500 per annum as compensation for such bailiffs, together with actual expenses in serving warrants and transporting persons to the workhouse. The county paid the sheriff the compensation provided for in this resolution. At an adjourned annual meeting held April 14, 1898, a resolution was offered and adpoted providing that the sheriff and clerk of the circuit court who took office in January, 1899, should receive no salary, or allowance by way of salary; intending to restore the sheriff to the fee basis provided by statute. It appears that the appellant, as sheriff, filed bills with the county board during the first fourteen months of his term, which were audited and allowed, for services rendered and disbursements incurred by him for services other than maintaining prisoners in the county jail, amounting in the aggregate to the sum of $10,208.92, which was paid him. This amount consists of various items—street car and railroad fare in transporting prisoners to and from the county workhouse; guarding persons in the hospitals, lawfully in custody; for guarding persons taken into custody, and detained under orders from the county court, whose sanity was to be inquired into; for

guarding an ore dock against damages by employees during a strike, on request of the owners for protection of their property against violence; for amount paid to a bailiff appointed by the sheriff, and who attended and served in the circuit court when in session—which amounts so paid did not come into the hands of defendant. In addition to the above allowances, the board audited and allowed bills presented for services and expenses incurred in unsuccessful trips in serving subpœnas in criminal cases without the county, and for services and expenses in returning escaped persons to the reform school. Other items sought to be recovered consisted of overpayments on accounts through mistake; overpayments on claims allowed for bringing persons from without the state; for services and expenses in the unsuccessful pursuit of fugitives without the state; services and expenses in the unsuccessful pursuit of persons out of the county, but within the state, who, it is claimed, escaped from custody without fault or negligence of the sheriff, which bills were allowed without a certificate of the district attorney certifying that the ends of justice would be promoted in making such pursuit; for overpayments allowed for taking persons to the reform school in Milwaukee on commitments from courts in *Douglas County,* calculated on the mileage basis, instead of a *per diem* and necessary disbursements; for overpayments on like claims for taking persons to the penal institutions of the state on commitments from the courts of *Douglas County,* and like claims for taking persons to the state insane asylum on commitment from the county court of *Douglas County.* The trial court adopted the facts as found by the referee, but modified the conclusion of law in some particulars, and awarded judgment against appellant for $12,943.97, with interest, and costs and disbursements in the action. From this judgment this appeal is taken.

H. W. Dietrich, for the appellant.

C. H. Crownhart, for the respondent.

SIEBECKER, J. The first claim urged in appellant's behalf is that the county board failed to fix a salary for the sheriff in lieu of all fees and compensation for services rendered within the limits of the county by himself, his undersheriff and deputies, except for keeping and maintaining prisoners in the county jail. This contention is based upon the fact that the resolution of the county board prescribing such salary was adopted at an adjourned session of the annual board meeting March 16, 1896. The board met in annual session November 12, 1895, and adjourned from time to time to this date. The minutes of the proceedings show that the board had adjourned its session to December 19th, at ten o'clock in the forenoon. On this day, at the appointed hour, in the absence of a quorum, the chairman declared a recess until the hour of two o'clock in the afternoon of the same day, when the session was resumed, with a quorum present. The action taken resulted in holding this session open until a later hour of the day. The declaration of the chairman was not an adjournment or postponement of the session. His action had no other result than to announce that no proceedings were to be taken for the period mentioned, on account of the absence of a quorum. The same result would have followed in the absence of a quorum without any announcement of no quorum before the hour when the session was resumed. Either course simply held the session open—suspended all proceedings until a quorum arrived, when they could be resumed.

Can the annual meeting prescribed by law for county boards be prolonged by adjournment from time to time? The statutes pertaining to the subject are silent on the question of adjourning the meeting to a future time. We must therefore look to the general power of such bodies for the answer to this question. The history of legislation germane to this subject affords no satisfactory answer. The legislative expression granting such power as to special sessions of the

board would seem to signify a recognition of the policy to permit adjournment, in that it extends this practice to special meetings, which right is seriously questioned without such express authority. As to general or annual meetings, it has been generally recognized that all *quasi*-judicial bodies possess the inherent power to adjourn the sessions of such meetings from time to time, within reasonable bounds, to a definite place and time. 1 Ency. Pl. & Pr. 248. It has been held:

"In the absence of statutory or constitutional provisions limiting or restraining the right of adjournment, every body of men, whether public or private, has the right to adjourn from day to day, or from time to time, or for any number of days, at any time, as it may think proper and expedient," and "whether the meeting is continued without interruption for many days, or by adjournment from day to day, or from time to time, many days intervening, it is evident it must be considered the same meeting, without loss or accumulation of power." *Comm. v. Brown,* 28 Kan. 83; *Donough v. Dewey,* 82 Mich. 309, 46 N. W. 782; Dillon, Mun. Corp. (4th ed.) § 269.

This power has been usually exercised by governing bodies like the county board. It is common knowledge that this right is deemed important for the necessary administration of county affairs, under the powers and duties imposed by law. Nor are any reasons suggested why the power is not an advantageous one to meet the requirements of a proper and successful administration of the county affairs in all respects. We are led to the conclusion that county boards have the power to adjourn their annual meetings, for any reasonable and sufficient grounds, both as to time and place of adjournment, attended with no diminution of power and such business as can be taken up at the initial session can properly be transacted at the adjourned session. It follows that the county board had thus fixed the salary of the sheriff of the county as found by the referee and court.

It was found that appellant was paid by the county for services rendered wholly within the county on a fee basis, and that he acted in good faith in filing the bills for payment, and that the district attorney and county board approved and allowed them in good faith, under the misapprehension that he was, in law, to be compensated by a fixed salary. Appellant contends that the money so paid under mistake of the law by all interested parties cannot be recovered in this suit, because it is in the nature of an action for money had and received. It is admitted that this court determined the question now suggested on a like state of facts before the court in the case of *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460, but we are invited to reconsider that decision. The principles applied in the *Snyder Case* had been announced and adhered to for many years prior thereto. In the case of *St. Croix Co. v. Webster,* 111 Wis. 270, 87 N. W. 302, this court reiterated the result of the decision upon this question presented, and adhered to the rule:

"A public officer takes his office *cum onere,* and all services performed by him within the scope of his official duties, or which are voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. If such officer receives [such] additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action at law."

This doctrine has been so often applied and accepted as the settled law of cases in this state as to preclude a re-examination of the subject. Nor do we find any grounds for a distinction which would except this case from what was held in the above cases. In *Northern T. Co. v. Snyder* the court distinctly asserts that the rule of *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798, did not rule the situation presented here. Under the facts found by the court, appellant, the members of the county board, and district attorney,

all acted in good faith, and believed their action was legal. The court there asserted that "so far as his bills are for the performance of duties which his office required him to perform, and for which he was entitled to pay, either by salary or otherwise, from the county, he did no more and no less than he would have done," had he been allowed payment under the fee system. As to any service not required of him officially, the county received no benefit, nor did it incur any liability. This left him in the same position, whatever system of payment was followed, and leaves no facts whereon to predicate an estoppel. All parties acted without authority, and wrongfully appropriated the public money, which must be returned to the rightful owner.

Proceeding now to the items which are challenged as wrongfully charged to appellant in the judgment, we find: The appellant included in his bills against the county, which were allowed and paid, items of street car and railway fare of prisoners, in transporting them to and from the county jail, workhouse, and the courts. If the items were proper charges to be allowed a sheriff under the fee system, then appellant is not entitled to them, because his salary is in lieu of all fees and compensation for services within the county, except for keeping and maintaining prisoners in the county jail. The items cannot be said to come within the exception. If these charges are not within the salary, then they, of necessity, were not lawful, and he must restore the money received therefor.

The judgment includes the amount of $255 paid to J. W. Harrington as deputy sheriff under appellant's appointment, who presented this claim for such services to the county board in his name, which was audited, allowed, and county orders issued in his name, and paid to him personally. The amount was included in the recovery upon the theory that such deputy was under the official authority of, and acting for, the sheriff, and therefore received this compensation

from him. This claim does not harmonize with the finding that the deputy presented his bill for such services as an individual claim against the county, and that it was so allowed and paid him personally. These circumstances of the transaction exclude the idea that appellant was a participant in the unlawful acts by which this money was obtained from the county. If he sustained a relationship of personal liability to the deputy, it is in no way affected by these illegal acts; nor has he in any way been pecuniarily benefited through this payment by the county. As above stated, this action is to recover moneys paid appellant without authority of law. It cannot include payments to other persons on the illegal bills against the county, when he was not entitled thereto, nor enriched thereby. We must hold this item should not be included in the recovery.

Appellant also charged and was allowed for services and disbursements in apprehending and returning fugitives from justice from without the state, without obtaining the certificate of the district attorney required by sec. 2, ch. 126, Laws of 1901, before the services were rendered, and bills for services in the unsuccessful pursuit of fugitives from justice within the state, outside the county, without having the certificates of the district attorney required by subd. 34, sec. 731, Stats. 1898, and without making proof before the county board when these claims were considered that the escape from custody or pursuit was not the result of his carelessness or negligence. The court found these claims were unauthorized, and the amount must be repaid. Similar items were presented in the *Snyder Case*. It was therein determined that it was necessary to comply with the statutory requirements, to entitle a sheriff to such fees, and to allow and pay them contrary to such expressed provisions was an abuse of power by the county board. To allow payment of such bills upon the ground that the district attorney now stands ready to make such certificates as appellant offered to show

upon this trial, and that the escapes were not the result of his carelessness or negligence, would, in effect, nullify the statute, and permit county boards to audit and pay such claims regardless of these positive restrictions, and result in an actual evasion of the legislative will. The law clearly imposes the duty of boards to become satisfied upon evidence brought before them that claims of this nature are just, before allowing them as claims against the county, and a failure of duty in this regard makes their action void. *Northern Trust Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460.

It is found that all the claims allowed and paid, and upon which a recovery is sought to be enforced, were paid in county orders, worth ninety per cent. of their face, and that appellant realized only this amount thereon. My brethren are of opinion that this action is based upon implied *assumpsit,* and is in its nature one for money had and received, and that respondent can recover no more than the actual amount of its money which got into the pockets of appellant, within the rule of *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 54, 74 N. W. 633, where it is said:

"The basis of recovery in the latter case [this class of cases] being a loss on one side, and a consequent enrichment on the other, liability can only exist in so far as these elements concur. . . . The promise that the law implies is that the guilty party will restore that which he has received, and which the other has shown himself entitled to. To the extent, therefore, which it is shown that the one party has suffered loss, and the other gained profit, can the recovery in this form be maintained." *Johnston v. Charles Abresch Co.* 109 Wis. 182, 85 N. W. 348, and cases cited.

The facts being established that the county orders, when issued and delivered, had a market value of ninety per cent. of their face value, and that being all appellant could actually realize thereon, it represents the loss of the county which went to the enrichment of appellant, and must therefore be the measure of the recovery. It follows from this conclusion

that ten per cent. ($1,268.90) of the face value of the orders received by appellant in payment of the items upon which recovery is had in this case should be deducted from the amount of the judgment as awarded by the court, after deducting the sum of $255 paid the deputy sheriff, J. W. Harrington, as heretofore indicated.

I am unable to persuade myself that the respondent should be restricted in its recovery to the amount appellant actually realized in money when he sold the county orders. It must be assumed that the county would pay, in money, out of the county treasury, the amount called for upon the face of these orders. The facts absolutely establish what amount of money the county must pay, for his benefit and use, upon the claims presented by him, for which the county received no consideration. In my opinion, it can make no difference whether he personally collected the amount called for, and thereby converted the money to his own use, or sold the orders to another, who actually received the money paid on these orders, which he had wrongfully obtained and converted before the county parted with the money, through the medium of an innocent purchaser for value. I do not perceive why his illegal acts of converting the orders should not be deemed an appropriation of the money actually paid thereon, for his use and benefit, and consequently make him liable to restore it.

I am authorized by Mr. Justice MARSHALL to state that he concurs in the view I have expressed upon the foregoing question in the case.

By the Court.—The judgment is modified by reducing the damages to $12,200.44, and the total to $12,314.69, and, as so modified, the judgment is affirmed; the appellant to recover costs in this court.

THE STATE EX REL. SOMMER, Appellant, vs. ERICKSON, County Clerk, Respondent.

January 13—February 2, 1904.

Mandamus: *Counties: Sheriffs: Compensation: Fees: Salary: Statutes: Construction: Constitutional law.*

1. Under ch. 217, Laws of 1901 (providing that the county board of any county might, at any time before *or during* the term of office of the sheriff, by resolution, change the method of compensating the sheriff, from fees, provided by law, to salaries; and that it should apply to all sheriffs, including those then holding office or thereafter to be elected), a resolution of the county board, in effect, that the *present* method of paying the sheriff a salary for work done within the county, and fees for work done outside the county, be changed in pursuance of said ch. 217, followed by a report of a committee of the board, that *thereafter* the sheriff "be paid a salary for all work of every kind—civil and criminal—inside and outside" the county, "and outside the state," and prescribing the salary so as to effect the change, which report was adopted in pursuance of ch. 217, is not ambiguous, and applied to the sheriff in office when the resolution took effect.
2. Ch. 217, Laws of 1901, expressly gives the power to make the changes therein specified to "the county board of *any* county," and is expressly made to "apply to *all* sheriffs, including those" then holding office. *Held*, that the purpose of said act was to give power to the county board of every county of the state to make the changes therein authorized, including a county which, under sec. 694*a*, S. & B. Ann. Stats., had changed from the fee system to a salary for services rendered the county within its limits, and had left the sheriff to be compensated for other services by fees as theretofore.
3. Under ch. 217, Laws of 1901 (providing that the county board may fix the salary of the sheriff of its county, and making such salary "in lieu of all fees, per diem, and compensation" previously authorized "for services rendered" by such sheriff, "except for keeping and maintaining prisoners in the county jail"), the county board is at liberty to fix a salary which shall be in addition to lawful disbursements, as well as a salary which should include such disbursements.
4. Ch. 217, Laws of 1901, authorizing county boards to change the

method of compensation of sheriffs from fees to a salary, does not conflict with sec. 23, art. IV, Const., requiring practical uniformity in county government, nor with sec. 26, art. IV, Const., forbidding the legislature to increase or diminish the compensation of a public officer during his term of office.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The relator was elected sheriff of Douglas county in November, 1900, and he brings this *mandamus* to compel the county clerk to issue and deliver to him a county order for the sum of $500 in payment of his salary as sheriff during the last four months of his term of office for services rendered wholly within the county. It appears from the relation, and is undisputed, that November 7, 1895, the county board, by resolution pursuant to sec. 694*a*, S. & B. Ann. Stats., changed the method then prescribed by law for compensating the sheriff for all services to be performed by him within the county, and therein provided that "said salary when so fixed shall be in lieu of all fees, compensation, and mileage for sheriff, and under-sheriff, and deputy sheriffs, for all services rendered by said officers within the limits of this county for which services the county is liable, excepting compensation for keeping and maintaining prisoners in the common jail," and further provided that such change should go into effect on the first Monday of January, 1897; that at an adjourned session of the annual meeting of the county board held March 16, 1896, the county board by resolution fixed such salary at $1,500 per annum, payable monthly at the end of each and every month. Such method of compensating the sheriff was in force in that county from the first Monday of January, 1897, to the first Monday of January, 1901. *Northern Trust Co. v. Snyder,* 113 Wis. 517, 89 N. W. 460. The same method of compensating the sheriff of that county continued until it was subsequently changed by the action of the county board. *Douglas County v. Will-*

iam J. Sommer, ante, p. 424, 98 N. W. 249. The relator claims that no change was made which went into effect during his term of office, or, in other words, until the first Monday of January, 1903. On the other hand, the defendant claims that a change was made August 27, 1902. It appears from the relation, and is undisputed, that at a duly called and legal special meeting of the county board of supervisors held August 27, 1902, the board, after the matter had been referred to, considered, and reported favorably by the committee thereof on sheriffs and courts, passed and adopted a resolution to the effect that the then present method of paying the sheriff a salary for work done *within the county,* and fees for work done outside the county, be changed, in pursuance of ch. 217, Laws of 1901, to the payment of a salary for work done *both inside and outside the county,* and that the county board fix the salary of the sheriff and undersheriff and deputies, including both civil and criminal work, and that the board did therein fix the salary of sheriff of Douglas county at $2,500 per year; undersheriff of that county, $1,000 per year; deputy sheriff of that county, $800 per year; and said salaries were each and all therein made payable in monthly installments; and they fixed the salary of additional deputies, who might act as bailiffs in court, to be paid $2 per day for the actual time spent in such services. Thereupon the defendant moved to quash the writ on the ground that the petition does not state facts sufficient to constitute a cause of action, and that no reason is therein stated for granting the alternative writ. Upon the hearing of the motion, the same was granted by the court, and an order was entered therein quashing and setting aside the alternative writ, and dismissing the petition, with costs and disbursements to be taxed, and judgment ordered accordingly. From the judgment so entered, the relator brings this appeal.

H. W. Dietrich, for the appellant.

C. H. Crownhart, for the respondent.

CASSODAY, C. J. Counsel for the relator is undoubtedly right in claiming that unless the relator's compensation as sheriff was changed, pursuant to ch. 217, Laws of 1901, by the action of the county board August 27, 1902, then it remained to the end of his term at $1,500 per annum for all services to be performed within the county for which the county was liable, as fixed March 16, 1896. There was certainly an attempt on August 27, 1902, to make such change, pursuant to ch. 217, Laws of 1901. Counsel contends that it was ineffectual, for several reasons:

1. Prior to the passage of that act the statute required the county board, at its annual meeting, to fix the salary of every county officer to be elected in the county during the ensuing year, and that the salary so fixed should "not be increased or diminished during his term of office." Sec. 694, Stats. 1898. Of course, that did not prevent the legislature from changing such statute. The act in question declared that "the county board of any county" might, "at any time before *or during* the term of office of the sheriff, by resolution, change the method of compensating the sheriff, undersheriff and deputies from fees, now provided by law, to salaries," etc. Sec. 1, ch. 217, Laws of 1901. The act further declared that it "shall apply to all sheriffs, including those now holding office or hereafter to be elected." Sec. 3, ch. 217, Laws of 1901. The argument is that, while the board were at liberty to make such change during the relator's then present term of office, yet that the action of the board had left it ambiguous as to whether such change was intended to apply to the relator, or to his successor in office. The resolution mentioned in the foregoing statement is that the then "*present* method of paying the sheriff a salary for work done within the county, and fees for work done outside the county, be changed in pursuance of" that chapter; and the committee of the county board then reported "that *thereafter* the sheriff of Douglas county be paid a salary for all work of every kind—civil and crim-

inal—inside and outside of Douglas county, and outside of the state," and therein fixed the salaries of the sheriff, undersheriff, and deputy, and prescribed the time and manner of paying such salaries. Such report of the committee was adopted so as to effect the change "in pursuance" of the act the same as the resolution had been. We must hold that the action of the board was unambiguous, and applied to the relator.

2. It is claimed that ch. 217, Laws of 1901, did not apply to Douglas county, because at the time of its enactment the sheriff of that county was being compensated by a salary for all services performed within the county, as prescribed by sec. 694*a*, S. & B. Ann. Stats., and by fees then provided by law for all other services. Other counties, as well as Douglas county, were at the time partly under the fee system and partly under the salary system prescribed in the section of the statute last cited. Unless the act in question authorized such counties to change the method of compensating the sheriff, undersheriff, and deputies from the fees then provided by law to salaries to be paid "in lieu of all fees, per diem and compensation for services rendered by them, except for keeping and maintaining prisoners in the county jail," then it is obvious that such counties—including Douglas county—will be in a class by themselves, with a double system of compensating sheriffs. The act expressly gives the power to make such change to "the county board of *any* county," and is expressly made to "apply to *all* sheriffs, including those now [then] holding office." The act expressly repealed ch. 151, Laws of 1899, which related only to Milwaukee county. Sec. 2, ch. 217, Laws of 1901. The bill for the enactment in question was introduced in the senate eighteen days after the decision of this court in *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 131, declaring certain acts of the legislature respecting the compensation of sheriffs in Milwaukee county unconstitutional and void. The obvi-

ous purpose of ch. 217, Laws of 1901, was to relieve Milwaukee county from the effect of that decision, and also to give power to the county board of every county in the state to make such change.

3. Counsel contend that the county board did not comply with the act in question by the resolution of August 27, 1902. This claim is based upon the ruling of this court in *Parsons v. Waukesha Co.* 83 Wis. 288, 290, 53 N. W. 507, where the sheriff was under a salary prescribed by sec. 694*a*, S. & B. Ann. Stats. In that case the late Mr. Justice PINNEY, speaking for the court, said:

"Under the system of compensation by specific fees, for which the salary is merely a substitute, the county would not be liable for livery hire in subpœnaing witnesses, or for car fare and livery hire in summoning the jury for the regular terms of the circuit court; and, as to assistance and conveyance in making arrests in criminal cases, the sheriff, under the fee system, could *claim nothing beyond* the prescribed fee for the arrest and conveyance of prisoners. . . . The object of the statute, and of the action of the county board under it, was to give a gross sum in lieu of specific fees, but not to open the door for the sheriff to make charges against the county *not theretofore authorized or allowed by law.*"

That act made the salary cover all fees and compensation for the sheriff, undersheriff, and deputy for all services within the county, except the fees of sheriffs in civil cases. The resolutions in question made the salaries of the sheriff, undersheriff, and deputy therein fixed to cover "all work of every kind, civil and criminal, inside and outside of Douglas county, and outside the state of Wisconsin," and also required the sheriff to "keep a true account of all the receipts of his office in civil and criminal cases, and on the first day of each and every month turn all moneys into the county treasury with a verified statement of such receipts, and that the sheriff also keep a true account of all the disbursements

of himself and deputies in administering their said offices and render to the county board each month verified statements of such disbursements and expenditures, to be allowed and paid by Douglas county. And that the county board at its meetings audit the said receipts and disbursements of the sheriff's office." Ch. 217, Laws of 1901, not only required the sheriff to "keep accurate books of account," as stated, but also to "carry the items of charges into a ledger account," and to "pay to the county treasurer all fees, per diem and other emoluments of whatever kind received by him, and shall at the end of each quarter of the year file with the county clerk, to be laid before the county board, a sworn statement of all such fees, per diem and emoluments collected by him or for him during the quarter of the year, *and all the expenses of his office during such time,*" and made such salaries "in lieu of all fees, per diem and compensation for services rendered by them, except for keeping and maintaining prisoners in the county jail." The distinction between the two statutes is very broad. Such salaries, under ch. 217, Laws of 1901, were to cover the actual services of such officers "in lieu of all fees, per diem and compensation" previously authorized "for services rendered" by such officers, "except for keeping and maintaining prisoners in the county jail." The obvious purpose of requiring the sheriff to "carry the items of charges into a ledger account," and to lay before the board a sworn statement of "all the expenses of his office during such time," was to enable the county board to audit the "disbursements of the sheriff's office," as well as the receipts of the sheriff's office, in order that such disbursements and expenditures as should be properly allowable as expenses of the sheriff's office should be paid by the county as provided in the resolutions. We perceive no good reason why the board were not at liberty to fix a salary which should be in addition to such lawful disbursements, as well

as a salary which should include such lawful disbursements. We must hold that the resolutions complied with the statute in question.

4. Counsel contends that the act in question is repugnant to the provision of the constitution which requires the legislature to "establish but one system of town and county government." Sec. 23, art. IV. As indicated, the act applied to every county in the state. The sheriff was elected the same as before. His subordinates were appointed the same as before. The office was administered the same as before. Absolute uniformity is not required. The system is only to be "as nearly uniform as practicable." The mere fact that the county board of any county may make such change in the method of compensating sheriffs does not interfere with such uniformity. *Verges v. Milwaukee Co.* 116 Wis. 200, 93 N. W. 44. The decision in the *Rooney Case,* cited, was under an act relating to a particular county. *Rooney v. Milwaukee Co.* 40 Wis. 23. *State ex rel. Peck v. Riordan,* 24 Wis. 484, cited, was similar in that respect. True, the constitution provides that the compensation of no public officer shall "be increased or diminished during his term of office." Sec. 26, art. IV. But it was held many years ago that such provision "only applies to officers who receive a fixed salary from the public treasury of the state." *Milwaukee Co. v. Hackett,* 21 Wis. 613; *Rooney v. Milwaukee Co.* 40 Wis. 26; *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557. This being so, it is obvious that the act in question was not invalid merely because it authorized the change in the compensation of the sheriff during his term.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

BUSSE, by guardian *ad litem,* Respondent, vs. ROGERS and another, Appellants.

January 13—February 2, 1904.

Negligence: Personal injuries: Pleading: Evidence: Appeal: Affirmance and reversal: Children: Highways: Nuisances: "Attractive nuisances."

1. In an action for personal injuries to a five-year-old child received while playing on a pile of timbers, the complaint considered, and *held* that the gist of the complaint was the instability of the timbers, which may have existed even though the reason for the instability alleged in the complaint was not proven, and hence evidence of other defective and instable conditions than those alleged was admissible.
2. Where there is evidence tending to support the conclusions of the jury, and it cannot be said that it is incredible, nor that all the reasonable probabilities and inferences are the other way, the rulings of the trial court therein cannot be reversed.
3. In an action for personal injuries it appeared, among other things, that plaintiff, a five-year-old child, was playing in a pile of timbers left by defendants opposite their own premises within the limits of a city street; that the timbers, through defendants' negligence were insecurely placed on the pile, and that plaintiff was injured by a timber falling on her. It also appeared that the traveled portion of the street was ample and properly prepared for travel; that the strip occupied by defendants, though within the limits of the street as dedicated, was used with the consent of the public authorities, and that plaintiff was not using or attempting to use the place for travel, but for play. *Held:*

   (1) That the timbers were wrongfully in the street, and constituted a nuisance in fact and in law.

   (2) That the act of leaving the pile of timbers in the street, in the condition disclosed by the evidence, was actionable negligence.

   (3) That the result which followed was one which might have been anticipated by an ordinarily prudent man under the circumstances.

   (4) That the fact that the plaintiff turned aside from traveling to play for a brief time in the highway did not necessarily prevent recovery.

4. In such case, the court intimates no opinion as to what would have been the result had it appeared that the pile of timbers was not upon the street, but upon the defendants' premises.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action to recover damages for personal injuries suffered by the plaintiff May 4, 1902, at which time she was a child of the age of about five years. At the date last mentioned, and for some time prior thereto, the defendants were copartners in the lumber business at Superior, Wisconsin, and maintained and operated a lumber yard at that city, which abutted for some distance on the west side of Grand avenue, a street of that city running north and south and 100 feet in width. The evidence shows that there was no fence on the west line of Grand avenue separating the defendants' lumber yard from the street, and that there was a space of eight feet in width between the sidewalk on the west side of Grand avenue and the line of the defendants' property, which space was, in part at least, used by the defendants for piling lumber and as part of their lumber yard. One pile of timber, composed of large square timbers from fourteen to sixteen feet in length and about twelve inches by twelve inches square, was piled parallel with Grand avenue, and partially, at least, upon this eight-foot space, the outermost part of the pile being about one foot and a half from the sidewalk. The testimony further tended to show that the pile of timber in question had a steplike formation toward the street, so that it could be easily climbed upon, and that upon the top of the pile there were two timbers placed in an oblique position, and so that upon a very slight application of force they would lose their equilibrium and fall toward the street. It further appears that upon May 4th aforesaid the plaintiff, with another child, came along upon Grand avenue, and stopped at this pile of timber, climbed upon it, and began running and playing upon one of the top

timbers, and that the timber rolled down toward the street with the child, and inflicted some personal injuries. A special verdict was rendered by the jury as follows:

"First. Was plaintiff, *Lillie Busse,* injured by a stick of timber rolling or falling on her at defendants' yard May 4th last? *Answer* (*by the court*). Yes. Second. Were defendants chargeable with want of ordinary care in permitting the stick or sticks of timber to be in the position it or they were? *A.* Yes. Third. If you answer above question 'Yes,' then answer this question: Was such want of ordinary care the proximate cause of the injury? *A.* Yes. Fourth. At the time of and immediately before the accident in question, was there a timber in any manner suspended in the derrick chains? *A.* No. Fifth. How far west of the sidewalk was plaintiff when the timber started to fall on her. *A.* Six and one half feet (6½ feet). Sixth. What was the distance from the west side of the sidewalk to the timber pile in question? *A.* One foot and one half (1½ feet). Seventh. At what sum do you assess plaintiff's damages? *A.* Three hundred dollars ($300.00)."

Upon this verdict judgment for the plaintiff was rendered, and the defendants appeal.

The cause was submitted for the appellants on the brief of *H. V. Gard,* and for the respondent on that of *Geo. C. Cooper* and *G. E. Dietrich.*

The appellants contended, *inter alia,* that plaintiff was a trespasser, and, assuming that defendants were negligent in piling the timbers, they were not liable for injuries to the plaintiff based on *mere want of ordinary care,* but only for gross negligence or carelessness in such degree of rashness or wantonness as evinces a total disregard for the safety of persons or property. *Klix v. Nieman,* 68 Wis. 271; *Schrug v. C., M. & St. P. R. Co.* 102 Wis. 515. The beginning of the doctrine that he who creates or permits to exist on his premises, in a place where children frequent, a dangerous piece of machinery, or anything, which from its nature is attractive to children, may be held liable to a trespassing

child so attracted, was in the case of *Sioux City & P. R. Co. v. Stout,* 17 Wall. 657. The cases cited therein (*Lynch v. Nurdin,* 1 Queen's Bench, 29; *Birge v. Gardner,* 19 Conn. 507; *Daley v. N. & W. R. Co.* 26 Conn. 591, and *Bird v. Holbrook,* 4 Bing. 628, with the exception of the *Daly Case,* since repudiated by the Connecticut court) were not authority for the *Stout Case* at the time it was decided—that is as it has been construed. *Hughes v. Macfie,* 2 Hurl. & Colt. 744; *Mangan v. Atterton,* L. R. 1 Exchq. 239; *Clark v. Chambers,* L. R. 3 Q. B. Div. 327; *Harrold v. Watney,* L. R. 2 Q. B. (1898) 320; *Nolan v. N. Y., N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106. The doctrine of the *Stout Case* has been unconditionally rejected in New Hampshire, New Jersey, West Virginia, Rhode Island, Massachusetts, Michigan and New York. *Clark v. Manchester,* 62 N. H. 577; *Frost v. E. R. R.* 64 N. H. 220, 9 Atl. 790; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 44 Atl. 809; *Turess v. N. Y. & S. W. R. Co.* 61 N. J. Law, 314, 40 Atl. 614; *Delaware, L. & W. R. Co. v. Reich,* 61 N. J. Law, 635, 40 Atl. 682; *Fitzpatrick v. Cumberland G. Mfg. Co.* 61 N. J. Law, 378, 39 Atl. 675; *Vanderbeck v. Hendry,* 34 N. J. Law, 467; *Uttermohlen v. Bogg's Run M. & Mfg. Co.* 50 W. Va. 457, 55 L. R. A. 911; *Ritz v. Wheeling,* 45 W. Va. 262, 43 L. R. A. 148; *Dicken v. Liverpool S. C. Co.* 41 W. Va. 511, 23 S. E. 582; *Paolino v. McKendall,* 24 R. I. 432, 60 L. R. A. 133; *Bishop v. Union R. Co.* 14 R. I. 314; *Holbrook v. Aldrich,* 168 Mass. 15; *Grindly v. McKechnie,* 163 Mass. 494; *McEachern v. B. & M. R. Co.* 150 Mass. 515; *Daniels v. N. Y. & N. E. R. Co.* (Mass.) 13 L. R. A. 248; *Ryan v. Towar,* 128 Mich. 463, 55 L. R. A. 310; *Charlebois v. Gogebic M. R. Co.* 91 Mich. 59, 51 N. W. 812; *Hargreaves v. Deacon,* 25 Mich. 1; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301; *McAlpin v. Powell,* 70 N. Y. 126; *Murphy v. Brooklyn,* 118 N. Y. 575; *Sterger v. Van Sicklen,* 132 N. Y. 499. Two New York cases (*Cosgrove v. Ogden,* 49 N. Y. 255, and *Earl v. Crouch,*

16 N. Y. Supp. 770), if ever authority for the *Stout Case* when they were decided, have, to that extent, been overruled by *Walsh v. Fitchburg R. Co.* 145 N. Y. 301. In Maryland, Louisiana, North Dakota, Alabama, Virginia, Utah and Connecticut, while the doctrine of the *Stout* and similar cases have not been expressly rejected, their decisions, either by the facts themselves, or by the reasoning in the opinion, repel such doctrine. *Mergenthaler v. Kirby,* 79 Md. 182; *Benson v. Baltimore T. Co.* 77 Md. 535, 20 L. R. A. 714; *O'Connor v. Ill. Cent. R. Co.* 44 La. Ann. 339, 10 So. 678; *Fredricks v. Ill. Cent. R. Co.* 46 La. Ann. 1180, 15 So. 413; *Culbertson v. C. C. R. Co.* 48 La. Ann. 1376, 20 So. 902; *Westerfield v. Levis,* 43 La. Ann. 63, 9 So. 52; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677; *Alabama G. S. R. Co. v. Moorer,* 116 Ala. 642, 22 So. 900; *Clark v. Richmond,* 83 Va. 355; *Robinson v. O. S. L. & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765; *Nolan v. N. Y., N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106. The decisions of the states of Maine, Mississippi and Vermont, while frequently cited against the doctrine of the *Stout Case,* really have no bearing on the question. *Morgan v. Hollowell,* 57 Me. 375; *Louisville v. Williams,* 69 Miss. 631; *Pierce v. Witcomb,* 48 Vt. 127. Kansas, Illinois, Arkansas, Mississippi, Tennessee, Washington, California and Colorado have unconditionally adopted the doctrine of the *Stout Case,* both in its application to turntables and other dangers. *Chicago, K. & W. R. Co. v. Bockovan,* 53 Kan. 279, 36 Pac. 322; *Gavin v. Chicago,* 97 Ill. 66, 37 Am. Rep. 99; *Lepnick v. Gaddis,* 72 Miss. 200, 26 L. R. A. 686; *Whirley v. Whitman,* 1 Head, 610; *Bates v. Railway Co.* 90 Tenn. 36, 5 S. W. 1069; *Cooper v. Overton,* 102 Tenn. 211, 73 Am. St. Rep. 864; *Malloy v. Hibernia S. & L. Soc.* (Cal.) 21 Pac. 525; *Peters v. Bowman,* 115 Cal. 345, 47 Pac. 113; *Kopplekom v. Colorado C. P. Co.* (Colo.) 54 L. R. A. 284. Minnesota, Missouri, Texas, Nebraska and Georgia have adopted the rule of the

Stout Case in its application to turntables and refused to extend it to other dangers. *Keefe v. M. & St. P. R. Co.* 21 Minn. 207; *Kolsti v. M. & St. L. R. Co.* 32 Minn. 133; *Twist v. W. & St. P. R. Co.* 39 Minn. 164; *O'Malley v. St. P., M. & M. R. Co.* 43 Minn. 289; *Koons v. St. L. & I. M. R. Co.* 65 Mo. 592; *Nagel v. M. P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Evansich v. G. C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Gulf, C. & S. F. R. Co. v. McWhirter* (Tex.) 14 S. W. 26; *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781; *Atchison & N. R. Co. v. Bailey,* 11 Neb. 332, 9 N. W. 50; *Chicago, B. & Q. R. Co. v. Krayenbuhl* (Neb.) 59 L. R. A. 920; *Ferguson v. C. & R. R. Co.* 77 Ga. 102; *Enerson v. Peteler,* 35 Minn. 481; *Ratte v. Dawson,* 50 Minn. 450; *Kayser v. Lindell,* 73 Minn. 123, 75 N. W. 1038; *Dehanitz v. St. Paul,* 73 Minn. 385, 75 N. W. 48; *Witte v. Stifel,* 126 Mo. 295, 28 S. W. 891; *Schmidt v. Kansas City D. Co.* 90 Mo. 284, 1 S. W. 865; *Moran v. Pullman P. C. Co.* 134 Mo. 641, 33 L. R. A. 755; *Overholt v. Vieths,* 93 Mo. 422, 6 S. W. 74; *Williams v. K. C., S. & M. R. Co.* 96 Mo. 275, 9 S. W. 573; *Barney v. H. & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Curley v. Missouri P. R. Co.* 98 Mo. 13, 10 S. W. 593; *Missouri, K. & T. R. Co. v. Edwards,* 90 Tex. 65, 32 L. R. A. 825; *Dobbins v. M., K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Dublin Cotton Oil Co. v. Jarrard,* 91 Tex. 289, 42 S. W. 959; *Slayton v. Fremont, E. & M. V. R. Co.* 40 Neb. 840, 59 N. W. 510; *Richards v. Connell,* 45 Neb. 467, 63 N. W. 915; *Omaha v. Bowman,* 52 Neb. 293, 40 L. R. A. 531; *Savannah, F. & W. R. Co. v. Beavers,* 113 Ga. 398, 54 L. R. A. 314. South Carolina belongs to a class by itself. It has approved the abstract doctrine of the *Stout Case* as applied to turntables, but the cases in which it was so approved were reversed on other grounds, and there are no other than turntable cases in which it has been invoked. *Bridger v. A. & S. R. Co.* 25 S. C. 24; *Bridger v. A. & S. R. Co.* 27

S. C. 456, 13 Am. St. Rep. 653. In another class of states, often cited as upholding the doctrine of the *Stout Case,* an examination discloses no authority whatever for it, and most of them could with better reason be cited against it. In this class are Indiana, Ohio, Kentucky, Pennsylvania and North Carolina. *Indianapolis, P. & C. R. Co. v. Pitzer,* 109 Ind. 179, 6 N. E. 310; *Indianapolis v. Emmelman,* 108 Ind. 530, 9 N. E. 155; *Penso v. McCormick,* 125 Ind. 116, 9 L. R. A. 313; *Harriman v. P. C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Bransom v. Labrot,* 81 Ky. 638, 50 Am. Rep. 193; *Hydraulic Works Co. v. Orr,* 83 Pa. St. 332; *Gillespie v. McGowan,* 100 Pa. St. 44; *Rogers v. Lees,* 140 Pa. St. 475, 12 L. R. A. 216; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 19 S. E. 730.

WINSLOW, J. A number of detail errors are alleged, which will be considered before proceeding to the main question on the merits of the case. First it is claimed that it was error to admit evidence showing merely defective and unstable piling of the timber, because it is said that this was not the negligence complained of in the complaint. The consideration of this objection requires some further statement of the facts. In the complaint it is alleged that the defendants maintained a large crane or derrick in their yard near the pile of timbers in question, which was used to unload cars, and which had a swinging arm and a windlass and cable to which were attached chains and hooks for lifting timbers from cars, and that "defendants piled a number of large timbers, about fourteen feet long and twelve or fourteen inches wide and of about the same thickness, in said yard, close to Grand avenue, so that said pile of timbers extended lengthwise with said avenue, and a few feet from said walk, and about four feet high; that defendants negligently and carelessly placed a large timber about fourteen feet long and twelve or fourteen inches wide and of about

the same thickness in said chains upon the top of said pile of timbers above described, so that one end of said timber projected over said pile of timbers and slightly over said sidewalk, and negligently and carelessly allowed said timber so placed to remain partially suspended in said chains and partially supported by said pile of timbers, so that the same would upon the slightest application of force lose its position of equilibrium and fall over the edge of said pile of timbers, knowing said position and condition to be unsafe and dangerous prior to May 4, 1902, and negligently and carelessly allowed said timber to remain and be in such condition and position until the time of the injury hereinafter described, knowing such position to be dangerous." The complaint further states, in substance, that the timber in question fell upon the plaintiff "by reason of the defective machinery in said derrick, and the defective, negligent, and careless manner in which said timber was secured and placed as aforesaid, and by reason of the negligence and carelessness of defendants in so placing and leaving said timber." The defendants claim that these allegations distinctly charge that the only negligence relied on was the leaving a timber partially suspended in the chains of the defective derrick and partly supported by the pile of timbers, and that all testimony introduced by the plaintiff tending to show simply that the timber was obliquely placed on the pile in an unstable or "teetery" position was inadmissible, because this was not the negligence pleaded; and the defendants' further claim is that, the jury having found upon sufficient evidence, in answer to the fourth question of the verdict, that no timber was in any manner suspended in the derrick chains, all charges of negligence made in the complaint have been rebutted, and judgment should have been rendered upon the verdict for the defendants. We cannot accede to these propositions. In our opinion, such a construction of the complaint would be entirely too narrow and technical. It is true that the com-

plaint charges at some length that the unstable timber was partially suspended in the derrick chains, but, after all, we think it clear that the gravamen of the charge of negligence is that the timber was left in such a position upon the pile that slight application of force would cause it to fall. One of the reasons given for the instability was that the timber hung partially in the derrick chains, and this turns out to be unfounded; but still the material fact that the timber was in some manner very insecurely placed remains, notwithstanding the fact now appears that the chains of the derrick had nothing to do with the instability. In other words, it was the instability of the timber which was the gist of the complaint, and this may well have existed even though one alleged reason for the instability was not proven.

Another contention made by appellants is that the answer to the fifth question of the special verdict should have been stricken out, because there was no credible evidence to support it. By this answer the jury found that the plaintiff was six and one half feet west of the sidewalk when the timber started to fall upon her. The significance of this finding is that it determines the fact that the plaintiff and the timber which fell were within the limits of Grand avenue when the accident happened. Examination of the record shows that there was much evidence to the contrary of this finding, and it might well be that, were the question an original one, we should be compelled to hold that the evidence preponderates against the finding; but there was evidence which tended to support the conclusion of the jury, and we cannot say that it was incredible, nor that all the reasonable probabilities and inferences were the other way; hence we cannot reverse the ruling of the trial court upon the question.

We pass now to the main question in the case, namely, whether a verdict for the defendant should not have been directed upon the uncontradicted evidence, or, in default of such a direction, whether judgment should not have been

rendered for the defendants upon the special verdict and the uncontradicted evidence. The simple facts to be considered in this connection are that a child five years of age was playing upon a pile of timber left by defendants within the limits of the street, and was injured by reason of a timber falling upon her, which had been insecurely placed upon the pile; there being evidence tending to show, and the jury having found, that the insecurity of the timber was an act of negligence on the part of the defendants. The appellants claim that the question whether the pile of timber was within the limits of the highway or not is of no moment. The traveled portion of the highway was of ample width, and was properly prepared for travel. The strip which the defendants used along the margin of their land upon which to pile lumber and timber, though within the limits of the street as dedicated, was used with the consent of the public authorities, and did in fact belong to the defendants, subject only to the easement of the public for travel; and the plaintiff was not using or attempting to use the place for travel, but for play, and hence was a trespasser. Assuming that she was a trespasser, and that the timber pile was rightfully in its position, the contention is that there can be no liability except upon the extreme theory of the doctrine of "attractive nuisances" as laid down in the line of cases generally known as "Turntable Cases." These cases are referred to in the case of *Klix v. Niemcn,* 68 Wis. 271, 32 N. W. 223, as "a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it;" but they are not expressly approved or disapproved in that case, and in fact the question has never been directly considered and passed upon by this court, though the reasoning of the case cited would seem rather opposed to the doctrine than otherwise. The doctrine in these cases seems to be that by creating or leaving on one's premises a dangerous

machine or thing which is especially calculated to attract children to play therewith, one impliedly invites children on his premises, and is guilty of negligence, if he does not take precaution to protect such children from injury. Thompson, Negligence, §§ 945–1024. This doctrine has been debated in many cases and in many courts with the result that there are many authorities supporting the doctrine in its broadest application, while many repudiate it entirely, and others give it qualified recognition, and practically limit it to railroad turntables. Appellants' counsel argue very strongly against the doctrine, and have submitted a markedly able brief reviewing the authorities on both sides of the question, and we shall direct that the citations be preserved in the report of the case. We do not, however, find it necessary to decide the question in the present case. This is not the case of an owner of land putting an attractive and lawful but dangerous machine or thing upon his own property and leaving it unguarded. It is the case of an owner placing an unlawful nuisance in the highway and leaving it ungarded. The defendants owned the land of the highway to the center line thereof opposite their premises, subject to the public easement of travel. They might doubtless temporarily obstruct the sidewalk in the transaction of their business, but they had no right to permanently store a pile of timber in the limits of the highway, even opposite their own premises. The timber was wrongfully there, even had the public authorities assumed to consent to it. It was a nuisance in fact and in law. Had a loose timber fallen from the pile by reason solely of negligent piling, and injured a traveler passing on the sidewalk, there would be little doubt of the liability of the defendants, and of the city as well, provided the danger was one which had existed long enough so that the city officials should have known of it. *Denby v. Willer,* 59 Wis. 241, 18 N. W. 169. Does the fact that the child was not then a traveler, but had turned aside for a moment to follow a natural

and childish inclination to play, entirely relieve the defendants from liability? This is the simple question presented, and it is not entirely easy of solution. In this case it appeared affirmatively by the evidence that children were accustomed to play in and about the street and the lumber yard to the knowledge of defendants, and to such an extent that the defendants had found it necessary to direct their employees not to allow children to play in the yard for fear they would get hurt. But aside from these facts the fact must also be considered that children do play in the public highways, and will doubtless continue to do so as long as child nature remains the same as it is now. The child who lags unwilling on the way to school and chases a bright-winged butterfly, or plays a game of marbles, or climbs a tempting pile of timber in the highway to play seesaw for a moment, does not thereby become an outlaw, and when injured by another's negligence he cannot be turned aside with the curt remark that he has ceased to travel, and become a trespasser, and hence can complain of no one's conduct. His natural habits and instincts must be in some way and degree recognized. This court has said that "children playing in the street are entitled to consideration." *Meibus v. Dodge,* 38 Wis. 300. The child has a right in the highway. It must be recognized that he will play therein if occasion offers. Indeed, we would not have it otherwise. The man or woman who would wish to wholly stop the flow of childish spirits while on the highway, and turn the little ones into men and women before their time, must either have had no childhood of his own or must have forgotten the fact. It would not be accurate to say that the streets are made for children to pay in, but it would be equally inaccurate to say that a property owner can totally disregard the fact that children always have, and probably always will, play therein. He cannot lawfully lay anything like a trap for the child upon the highway, and escape the consequences by saying that the child

would not have been injured had he confined himself to traveling exclusively. The case of *Meibus v. Dodge,* just cited, is an illustration of the principle. In this case a man left a dog, which he knew to be ferocious, in his sleigh upon the public street, and a child passing upon the sidewalk turned aside and meddled with a whip in the sleigh, and the dog threw him down and bit him. A judgment for the plaintiff was affirmed. The contention there was that the child was committing a trespass when he meddled with the whip, and hence was entitled to no protection; but the argument was rejected, and it was said that the act of the child was one which might well be anticipated; that the child did not forfeit all claims to protection simply because he turned aside for a moment and touched the whip; and that the defendant had no right to leave a dog, which he knew to be ferocious, unsecured in the public street, where children were liable to be passing, and might be reasonably expected to indulge in such childish acts as the one in question. We regard the reasoning of the case as quite satisfactory, and in substance applicable to the present situation. The central idea is that children are liable always to be upon the public streets, and also are liable to turn aside from traveling and play or meddle with attractive things left thereon; that a reasonable man must bear this fact in mind, and hence may not negligently or willfully place upon the street a dangerous animal or trap well calculated to arouse the admiration or curiosity of a child, and, when it has accomplished the natural result which might reasonably be expected, escape the consequences by saying that the injured child should not have yielded to his curiosity. It is well known that there is nothing much more attractive to children than a pile of lumber or timber, especially one which affords opportunities for a seesaw. This, according to the findings, was what the defendants placed in the street in the present case, so arranged that the heavy timbers would almost immediately fall when the childish

amusement commenced. We think there was ample room for the jury to find, as they did, that the act of leaving the timber in the highway in this condition was actionable negligence, and that the result which followed was one which might reasonably have been anticipated by an ordinarily prudent man under the circumstances; and we also hold that the fact that the child turned aside from traveling to play for a brief time in the highway does not necessarily prevent a recovery, although such might be the result in an action against the city to enforce the statutory liability under sec. 1339, Stats. 1898.

As previously indicated, we do not decide what would be the result had it appeared that the pile of timber was not upon the street, but upon the defendants' premises; nor do we intimate any opinion thereon. In the present case the pile of timber was in the highway, and this fact must be kept in mind at all times in determining the effect of the principles laid down.

By the Court.—Judgment affirmed.

WELCH, Respondent, vs. FIRE ASSOCIATION OF PHILADELPHIA, Appellant.

January 13—February 2, 1904.

Fire insurance: General agent: Knowledge of agent: Standard policy law: Estoppel in pais: *Waiver: Statutes: Proof of loss: Forfeiture.*

1. One who, as a broker, obtains for another, from the regular agent of an insurance company, a policy of fire insurance, delivering it to, and collecting the premium from, such other, and paying the latter to such agent, is, as to such transaction, a general agent of such company under sec. 1977, Stats. 1898.

2. Prior to the standard policy law, knowledge of the agent of an insurance company, at the time of making a contract of insurance for it, of facts affecting the validity thereof, was in regard thereto equivalent to knowledge of such facts by the company.
3. Independently of the standard policy law, knowledge of an insurance company, direct or indirect, at the time of issuing a policy of insurance, of facts respecting the subject thereof affecting the validity of the contract, precludes it, on principles of estoppel *in pais*, from taking advantage of such facts, in case of a loss, to escape liability.
4. The disability provisions of the standard policy law as to waiver do not abrogate the judicial rule protecting a policy holder, upon principles of estoppel *in pais*, as to circumstances affecting the validity of the contract known to the insurance company at the inception thereof.
5. The clause of the standard policy law expressly continuing in force the rule charging an insurance company with the knowledge possessed by its agent at the time of the delivery by him of a policy, was incorporated into such law to prevent impairment of the legal effect of such knowledge as established by the decisions of this court.
6. The effect of the rule so established and preserved is that an insurance company, assuming one attitude as to known facts for the purpose of making an insurance contract, is not permitted to sucessfully assume a different and inconsistent attitude to avoid it.
7. There being no provision in the standard policy, in connection with that requiring proofs within sixty days after the occurrence of a loss, rendering failure to comply therewith a cause of forfeiture, such failure merely postpones the maturity of the claim till sixty days after such proofs are furnished.
8. The principle last above stated was an element in the judicial policy of this state when the standard policy law was enacted, and was preserved therein by this language, "The loss shall be payable sixty days after the notice of proof of loss required has been received by the company," and by the omission therefrom of any provision making failure to furnish proofs within sixty days after a fire a cause of forfeiture.
9. The provision of the policy last spoken of, that charging an insurance company with knowledge possessed by its agent at the time of the delivery of a policy, vital to the validity thereof, and that charging the company with knowledge possessed by its agent engaged in adjusting a loss thereunder, were incor-

porated in the standard policy in order to prevent impairment of existing rules on the subject, according to the judicial policy of the state.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to recover on a fire insurance policy. The complaint was in the usual form. The policy was issued April 5, 1902, to run three years. It was in the standard form. The insurance was $500 on plaintiff's house and $200 on his personal property therein. The fire occurred August 12, 1902. Proofs of loss were furnished defendant November 11th thereafter. The amount sought to be recovered is $500. Defendant answered claiming a forfeiture for noncompliance with a condition of the policy requiring proofs of loss to be furnished the company within sixty days after the fire, and further because he had only a leasehold interest in the land upon which his house was located, while the policy expressly provided that it should be of no effect if his title was other than absolute, unless otherwise provided by agreement indorsed upon the policy and added thereto; and that it contained the further provision that no agent or officer or representative of the company should have the power or be deemed to have waived any condition of the policy unless such waiver should be indorsed upon or added to the policy.

The evidence was to the effect that proofs of loss were delivered to defendant as stated in the complaint; that plaintiff's title to the realty was as stated in the answer; that no change in writing was made in the insurance contract from the standard policy; that Fowler, who obtained the policy for plaintiff, was not an agent for defendant except by force of the statute; that, acting in the capacity of a broker, he obtained the policy for plaintiff from Loney & Peckham, defendant's agents; that he delivered it to plaintiff, receiving from him the premium therefor and turning it over to such

agents for the benefit of defendant, and that they had such benefit; that at the time of the making of the insurance contract such broker was fully informed as to the nature of plaintiff's title; that he was an insurance agent, and when applied to for a policy was informed as to the nature of plaintiff's title; that thereupon he informed plaintiff that his company would not insure the property, but that he would endeavor to obtain a policy for him in some other company; that Loney & Peckham, defendant's agents, had no knowledge at the time of the delivery of the policy of the character of defendant's title.

On the controverted questions of fact the jury found specially that plaintiff's house was not totally destroyed; that it was injured to the extent of $100, and that his personal property was injured to the extent of $200. Defendant moved for judgment, upon the verdict and the uncontroverted facts, dismissing the complaint, which was denied. A motion for judgment in favor of plaintiff upon the verdict for $300 and interest was granted, and judgment was rendered accordingly.

Victor Linley, for the appellant.

For the respondent the cause was submitted on the brief of *Archibald McKay.*

MARSHALL, J. A decision in appellant's favor of one or more of these questions would require a reversal: (1) Was the person who procured the policy for respondent, delivered the same to him, received the premium therefor and paid it to appellant through its agents, Loney & Peckham, its general agent under the laws of this state? (2) If he was such agent, so that his knowledge of the true character of respondent's title must be deemed equivalent to knowledge thereof by appellant, can the latter yet defeat his claim because of the forfeiture clause respecting the title to the subject of insurance being other than absolutely vested in him, and the

prohibition of any change in the insurance contract by any representative of appellant except by agreement indorsed thereon or added thereto? (3) Did failure to furnish proofs of loss within the time stipulated in the policy terminate appellant's liability?

The first question is covered by the statute (sec. 1977, Stats. 1898). It provides:

"Whoever solicits insurance on behalf of any . . . person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, . . . shall be held to be an agent of such corporation to all intents and purposes unless it can be shown that he receives no compensation for such services."

No argument is needed to demonstrate that the acts of Fowler in reference to the policy in question satisfy some one of the circumstances mentioned in the statute, fixing his status, to have been that of a general agent of appellant. It is contended that, as he acted in the capacity of broker, Loney & Peckham being the regular agents of appellant, whatever business he did was either for such agents or for the assured, hence that the statute does not apply. That is clearly ruled otherwise by *John R. Davis L. Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 70 N. W. 84; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575, 7 N. W. 544, and other cases, in which it is held that a person who procures a policy of fire insurance for another from the agent of the insurance company issuing the same, acts in a twofold capacity; that of agent for the insured, and, by force of the statute, agent for the insurer; and that his knowledge at the inception of the contract is deemed to be that of the company the same as if he were regularly employed by it as its general agent.

Upon the second question submitted, it appears that, unless

the ruling should be different under the standard policy law, then independently thereof, it must be conceded that the assurer cannot defeat respondent's claim because of any defect in the title to his property known to Fowler when the contract was made, regardless of the terms of such contract. In *Roberts v. Continental Ins. Co.* 41 Wis. 321, after citing a long line of decisions in this court, it was said, in effect, that if, when the agent of an insurance company delivers a policy of insurance, he has knowledge of the facts as regards the subject of the insurance inconsistent with the terms of the policy, the assurer, by accepting the premium, is estopped from declaring the policy void because the terms thereof were not so changed in writing as to conform to the facts. There have been many subsequent decisions to the same effect. *Renier v. Dwelling House Ins. Co.* 74 Wis. 94, 42 N. W. 208; *Zell v. Herman F. M. Ins. Co.* 75 Wis. 521, 44 N. W. 828; *Stanhilber v. Mut. Mill Ins. Co.* 76 Wis. 285, 45 N. W. 221; *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606, 57 N. W. 347; *Goss v. Agricultural Ins. Co.* 92 Wis. 233, 65 N. W. 1036; *Schultz v. Caledonian Ins. Co.* 94 Wis. 42, 68 N. W. 414; *Johnston v. N. W. Live Stock Ins. Co.* 94 Wis. 117, 68 N. W. 868; *De Witt v. Home Forum,* 95 Wis. 305, 70 N. W. 476; *St. Clara Female Academy v. N. W. Nat. Ins. Co.* 98 Wis. 257, 73 N. W. 767; *Hobkirk v. Phœnix Ins. Co.* 102 Wis. 13, 16, 78 N. W. 160. These propositions, independently of statutory change, are therein firmly established: (1) Knowledge of an agent of an insurance company at the time of delivering one of its policies, of facts regarding the subject of the insurance inconsistent with the stipulations in the policy in respect thereto, is in legal effect knowledge of the company. (2) A person who delivers the policy and receives the premium, though acting as a broker, is also agent for the company within the foregoing rule by force of the statute. (3) If an insurance company delivers one of its policies and receives the premium therefor

with knowledge of facts rendering it void when its terms are applied to such facts, in legal effect it thereby assures its customer that as regards the contract the condition of the property shall be considered in all respects according to the calls of such contract, regardless of the truth of the matter, and invites him to rely thereon; and such invitation being accepted, the company is estopped from thereafter changing its position to the prejudice of the assured, though the policy declares that no condition thereof is subject to waiver except by written agreement indorsed thereon or added thereto. (4) The doctrine of waiver, strictly so called, is not involved in the last foregoing rule. It rests solely on the principle of estoppel *in pais*,—the principle that one person cannot assume a position in his business relations with another in respect to a transaction of a pecuniary nature upon which such other, acting reasonably, has a right to rely, and after such other has so acted change his position to that other's prejudice and obtain judicial aid to enable him to effectuate his fraudulent purpose.

It is confidently insisted in appellant's behalf that the standard policy law has changed the foregoing judicial rule, and that this court has so held. There is some warrant therefor, though a careful examination of all the decisions bearing on the subject shows that the court has not committed itself to the extent claimed by counsel. There are three classes of cases to be considered: (1) Those involving policies made after ch. 195, Laws of 1891, was passed, and when it was supposed to be valid; (2) those decided after such law was condemned as unconstitutional, but wherein it was referred to in a way to indicate that the decisions might have been otherwise had the attempted legislation been effective; (3) decisions made as to policies governed by the present valid policy law. The provisions under the first law, as regards the questions involved here, are similar to those in the later law except for an additional clause which will

be refered to at length later. So far as declarations were made in the decision respecting the effect of such provisions upon the precise question now here, they should be considered authoritative and followed unless clearly wrong.

The only case of special significance in the first class above mentioned is *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606, 57 N. W. 347. Language was there used to the effect that the legislative purpose was to have but one form for insurance contracts, to require it to be in writing, and to confine all inquiries as to the legal right of the parties to the statements therein. The only application of that embodied in the decision was this: It was held that a verbal promise by an agent at the time of delivering the policy, that the assured might thereafter do things respecting the subject of the insurance inconsistent with the terms of the policy, is within the prohibition of any agreement respecting the subject of the insurance other than one indorsed upon the policy or added thereto and within the prohibition respecting waiver by agents. The doctrine of waiver, strictly so called, was what was in the mind of the court. That of estoppel preventing the company from breaching good faith with its patron by issuing to him a policy and taking his money therefor with knowledge of conditions rendering it at once void, was not suggested or involved.

Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738; *Goss v. Agricultural Ins. Co.* 92 Wis. 233, 65 N. W. 1036; *McDonald v. Fire Asso. of Phila.* 93 Wis. 348, 67 N. W. 719; *Hobkirk v. Phœnix Ins. Co.* 102 Wis. 13, 78 N. W. 160, are in the second class referred to. The reasoning in each of them is that there was an effectual waiver of a condition contained in the policy under the judicial rule, that not having been abrogated by the law of 1891 since such law was void. It is fair argument to say from those decisions that had the law been regarded as binding, they would have been to the effect that the standard policy law did abrogate

the judicial rule declared and applied in *Renier v. Dwelling House Ins. Co.* 74 Wis. 94, 42 N. W. 208, and similar cases, though the court stopped short of saying that. The strongest language on the subject is in *Hobkirk v. Phœnix Ins. Co.* as follows:

Ch. 195, Laws of 1891, was enacted for the purpose of prescribing a written form of policy which would prevent any waiver of any conditions therein, except as therein prescribed. On the assumption that that act was valid, this court held, in effect, that the conditions and provisions of such standard policy were binding, and could not be changed or waived, except in the manner indicated, referring to *Bourgeois v. N. W. Nat. Ins. Co. supra.*

The law of 1891 being void, no decision upon the point here involved was necessary, nor was in fact made in any of such cases. The nearest approach thereto was in *Bourgeois v. N. W. Nat. Ins. Co. supra,* decided before the invalidity of the law was discovered, which went on the doctrine of waiver, strictly so called, and the effect of the statute in respect thereto.

Straker v. Phenix Ins. Co. 101 Wis. 413, 77 N. W. 752, had to do with a policy issued under the present law, and the effect of knowledge of the agent of acts of the assured during the life of his contract increasing the fire hazard, as regards waiving the condition of the policy rendering the same void in case of any such increase unless permitted by agreement with the company indorsed upon the policy or added thereto. While the standard policy law was referred to as vital to the question in the case and the decision was largely based on what was said in *Bourgeois v. N. W. Nat. Ins. Co.* it is apparent that not only was the turning question governed by the law of waiver, strictly so called, but the decision could not have been different had there been no statutory policy law. The court has never held, in the face of a policy provision forfeiting the contract for a violation of its

provisions by the assured after the issuance thereof, such provision being accompanied by a stipulation that it shall not be deemed waived other than by a writing indorsed thereon, that a waiver could take place in any other manner. The court has often held to the contrary. *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Carey v. German Am. Ins. Co.* 84 Wis. 80, 54 N. W. 18; *Burr v. German Ins. Co.* 84 Wis. 76, 54 N. W. 22. The principle involved, however, has little if any analogy to that of estoppel as applied in *Renier v. Dwelling House Ins. Co.* and similar cases, though it is true that the term "waiver" has been commonly used in such a way as to indicate to the contrary. In *Matthews v. Capital F. Ins. Co.* 115 Wis. 272, 91 N. W. 675, a clear distinction was drawn between the two principles. Although it was there said that waiver is commonly applied to acts going to the validity of the contract rather than those in regard to establishing liability thereon after the happening of a loss, it is made clear that the acts going to such validity which were in the mind of the court, were those occurring after the making of the contract and before a loss; not those involved in its inception. It cannot be doubted that, in the absence of any legislative regulation to the contrary, an insurance company may be guilty of such conduct in the making of an insurance contract as to estop it from successfully pleading the truth as regards the condition of the subject of the insurance inconsistent with the terms of the policy, to avoid paying a loss to the policy holder occasioned by an injury to or destruction of such subject.

After a careful consideration of the matter we are unable to discover any very good reason for holding that it was intended by the legislature, in enacting the standard policy law, to abrogate the judicial rule so firmly established, as above indicated. It is quite apparent that the contrary was intended. In the closing paragraph, sec. 1941—62, Stats. 1898, occurs this significant language, following the dis-

ability clauses upon which appellant relies as indicating an intention to change the judicial rule:

"Up to the time of the delivery of the policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company."

It must be presumed that the word "agent" was there used in the same sense as in sec. 1977. Why was that clause framed so perfectly voicing the foundation principle of the doctrine in *Renier v. Dwelling House Ins. Co.* and similar cases, if it were intended to abrogate the judicial rule, as we have termed it, as regards estopping the company by occurrences characterizing the making of the contract, or the further rule in respect to estoppel by conduct of the company acting by its agent after loss, referred to in *Matthews v. Capital F. Ins. Co. supra,* and well established in the law of insurance, at the time the policy law was enacted? Could there have been any other purpose than to extend to policy holders, by legislative enactment, the same protection they had theretofore enjoyed when the making of their contracts was wholly under the control of the parties thereto? What object was there in embodying the clause under consideration in the law at all if it were not to be treated as an exception to that part immediately preceding it, the disability provisions upon which appellant relies? If the two clauses are not to stand together, the latter being an exception in a sense, to the former, then the latter would seem to be clear surplusage. The latter clause was not in the policy prepared by the insurance commissioner under the law of 1891, which was in part construed by the court in *Bourgeois v. N. W. Nat. Ins. Co.* while that part of sec. 1941—62 preceding it is a *verbatim* copy of the commissioner's form. That circum-

stance renders it well-nigh, if not decidedly beyond reasonable controversy, that the added language was used to incorporate into the statute, in effect, existing law as found in the decisions of this court.

If we were to entirely overlook the latter part of the standard policy above discussed, and yet give effect to the judicial rule, as in *Renier v. Dwelling House Ins. Co.* it would not seem to violate the disability clause thereof on the subject of waiver, since, as we have seen, it does not deal with that subject in any proper sense. Such giving effect works no change in the policy, strictly speaking. It only estops the assurer, by reason of its conduct, from successfully alleging that the situation of the subject of insurance is not as indicated therein. In other words, the rule stands guard over the rights of the policy holder, protecting him from loss by reason of the assurer assuming one attitude with knowledge of all the facts, for the purpose of making a policy contract, and then assuming another and inconsistent attitude to avoid it. If the doctrine is right independently of the standard policy law, it seems that nothing therein on the subject of waiver condemns it, while in connection with such subject, as we have indicated, there seems to have been an attempt made to make such doctrine a part of the statute. It could not be successfully contended that it was the purpose of the legislature to enable insurance companies to profit by what was regarded at the time of its enactment as a fraud, without some clear, unmistakable language to that effect. Certainly, in the face of plain indications to the contrary, such a contention can find no favor here.

It is well understood that the judicial rule here discussed is peculiar to insurance contracts, and significantly exceptional in that it ignores the familiar principle applied to written obligations generally, that he who becomes a party to such an obligation is presumed to have knowledge of its contents and is bound thereby, unless by some artifice resorted

to by the other party thereto, reasonably calculated to prevent or deter him from obtaining such knowledge, he is so prevented or deterred. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. As an original proposition it would be difficult to justify that special favor to policy holders in actions to recover losses sustained. The long line of decisions in this state supporting it, however, precludes any change thereof other than by legislative enactment. The authorities elsewhere are not all in harmony with it. A very few condemn it. *Northern Assur. Co. v. Grand View B. Asso.* 183 U. S. 308, 22 Sup. Ct. 133, is a significant instance thereof. In that case the departure from general principles is most vigorously condemned in this language:

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais,* is a mere invasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with."

The court said further, in effect, the only exception to that is where, by fraud, a person is induced to accept a contract different from the one agreed upon, in excusable ignorance of the variance. The exception thus condemned has the sanction of some forty years of our judicial history and of the general run of authorities. Under the circumstances we do not feel warranted in overturning it or seriously questioning the wisdom of it.

The conclusion to which we have arrived is supported by the courts generally where a policy law exists. That is amply shown by citations in the brief of counsel for respondent, and the absence of authorities to the contrary in that of appellant, and our own inability to discover any. In the sup-

porting authorities it appears that there was no judicial hesitation in holding that a policy like ours does not, in letter or in spirit, affect the established rule that an insurance company, barring fraud upon it, participated in by the assured and its agent (*Koerts v. Grand Lodge, Hermann's Sons,* 119 Wis. 520, 97 N. W. 163), cannot avoid the effect of the law charging it with knowledge which its agent has at the time of delivering its policy of insurance, respecting the condition of the subject thereof. In all cases, or most of them, waiver is sharply distinguished from estoppel. *Forward v. Continental Ins. Co.* 142 N. Y. 382, 37 N. E. 615; *Wood v. Am. F. Ins. Co.* 149 N. Y. 382, 44 N. E. 80; *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 477, 44 N. E. 159; *Skinner v. Norman,* 165 N. Y. 565, 59 N. E. 309; *Hadley v. New Hampshire F. Ins. Co.* 55 N. H. 110; *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 441, 52 Atl. 858; *Clawson v. Citizens' Mut. F. Ins. Co.* 121 Mich. 591, 80 N. W. 573.

Counsel for appellant cites the Minnesota supreme court as holding contrary to the foregoing in *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241. We do not so understand that case. Two points were there involved; one being that discussed here, and the other the constitutionality of the standard policy law. Both were at first decided in favor of the company, one justice expressing doubt and favoring a rehearing, and another dissenting particularly on the first point. A reargument was ordered, and on the final disposition of the case the justice who dissented at first wrote the opinion, by which the decision was rested solely on the unconstitutionality of the law. The other point was entirely omitted from the case.

Appellant's last point is ruled in favor of respondent by *Flatley v. Phenix Ins. Co.* 95 Wis. 618, 70 N. W. 828. That is in accordance with the general rule laid down in the textbooks and supported by an abundance of authority, that a re-

quirement in a policy of insurance as regards furnishing the proofs of loss within a specified time, not coupled with any provision making failure to comply therewith a cause of forfeiture, at the most only affects the maturity of the claim. Joyce, Ins. § 3282. That was the doctrine of this court when the standard policy law was framed, and in harmony therewith no forfeiture clause was incorporated therein in connection with the requirement for proofs of loss, but this language was so incorporated:

"The loss shall become payable sixty days after notice and proofs of loss herein required have been received by this company." Sec. 1941—57, Stats. 1898.

The fundamental principle involved is that forfeitures are not favored and will be held not to have been intended in the absence of language clearly indicating the contrary. That applies as well to a law as to a contract. So, though in *Flatley v. Phenix Ins. Co.* the question was raised as regards a contract which at its inception was wholly under the control of the parties thereto, it having been issued before we had a valid policy law, it applies just as strongly in this case. Moreover, the doctrine of the court, as indicated, was in effect incorporated into the policy.

By the Court.—The judgment is affirmed.

CITY OF WAUKESHA, Appellant, vs. RANDLES and another, Respondents.

January 14—February 2, 1904.

Municipal corporations: Streets and sidewalks: Improvements: Abutting owners: Parties to proceedings: Statutes: Construction.

1. Sec. 925—175, Stats. 1898, of the general charter law, gives cities the power to improve streets, and subch. XIX (secs. 925—201 to 925—207, Stats. 1898), provides how, in the construction

and maintenance of sidewalks, these powers shall be exercised, and that the expense of every original construction and relaying of sidewalks is chargeable upon the lots abutting upon the improved part of the streets. *Held:*

(1) That such liability on the part of the lot owner makes him an interested party to the proceedings resulting in such improvements, and vests him with the right to insist that the course of action prescribed be followed by the representatives of the city in executing and carrying out such improvements.

(2) That the city is limited to the course therein prescribed, in constructing, maintaining, and improving sidewalks, and is liable for injuries resulting from illegal proceedings.

2. Sec. 925—204, Stats. 1898, as amended by ch. 173, Laws of 1899, provides that it shall be the duty of the owner of every lot, abutting upon an improved street or a street ordered to be improved, whereon the grading for a sidewalk has been done for ten days or more, to lay at his own expense a standard sidewalk in front of the same, etc., and that whenever the board of public works shall declare any sidewalk unsafe, defective or insufficient, and require the same to be removed and replaced with a new sidewalk, it shall be the duty of the abutting lot owner to lay a standard sidewalk within three days after service of the order made by the board of public works requiring the removal and relaying of the sidewalk. It appeared, among other things, that on July 15 the board of public works of the plaintiff city, by resolution, condemned defendants' sidewalk as insufficient and unsafe, and ordered grading and relaying of the same; that on August 5 the permanent improvement of the street in front of defendants' premises was ordered; that on August 20 defendants were served with the order of July 15 and notice to grade the street and rebuild a standard tar sidewalk on the established grade, in place of the former one, within three days, and that, on defendants' refusal to comply with such order and notice, the board on August 25, let the contract for the building of the sidewalk, but defendants prevented the contractor from carrying it out. It further appeared that the city officials had done nothing to grade the street under the order of August 5, and that they contemplated extensive grading of the sidewalk portion of the street—filling to the depth of five or six feet, and cutting down to a depth of about two feet—to make it conform to the established grade. *Held:*

(1) That the building of such sidewalk was an improvement permanent in its nature and not a repair for temporary use until the contemplated permanent improvement be executed.

(2) That defendants could not be required to do the work prescribed by the order of July 15, under the statutory provisions authorizing the rebuilding of an insufficient and defective walk.

(3) That defendants had the right to insist that the grading for the sidewalk should be considered part of the permanent improvement of the street, and let by contract with the other work on such street, and that the expense thereof be borne in all respects like that of improving the streets.

(4) That defendants were entitled to have ten days after such grading was completed in which to lay the sidewalk at their own expense.

(5) That the action of the city officials in undertaking to grade for and lay such sidewalk was illegal.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Appellant is a city of the fourth class under the general charter law. This action was brought to restrain the respondents from forcibly interfering with and preventing the city's officers and servants from grading and rebuilding sidewalks in front of respondents' lots on portions of Hartwell and Arcadian avenues. It is admitted that respondents own lots abutting on the avenues, as alleged in the complaint; that the board of public works, July 15, 1902, passed a resolution declaring the sidewalks on the streets in front of respondents' property to be out of repair and defective, and ordered grading and relaying of the sidewalk; and that notice of the order was served on respondents on August 20, 1902. The order and the notice required them to grade the streets and rebuild the walks on these streets within three days after service of the notice and order, according to the requirements and specifications therein prescribed. Respondents refused and neglected to comply with the notice and order, whereupon the board of public works contracted, August 20, 1902, with Herman Wilkie, to make such improvements, and he began the grading, preparatory to rebuilding the sidewalk, in compliance with the specifications and order

and under the direction of the board of public works. The improvement ordered required grading of the streets for the sidewalk and necessitated filling in and cutting down different portions of the streets to accomplish the improvements in question. These streets had never been graded to conform to the established grades. Hartwell avenue had not been ordered improved before the service of this order and notice on respondents. The fact stands conceded in the record that the city on August 5, 1902, had ordered Arcadian avenue to be permanently improved. It appears that the avenue required grading before laying the sidewalk in connection with the permanent improvement so ordered, and that nothing had been done in this respect. The improvement undertaken at the time in question did not constitute a part of this permanent improvement of the street, but was designed merely to replace and repair a defective and insufficient walk, and for these purposes the officers and employees entered upon and began grading parts of respondents' lots abutting Arcadian avenue. The contract under which the work was to be executed was let without advertising for proposals and bids in the official city paper. Upon the facts established, judgment was awarded dismissing the complaint and for costs. From this judgment the city appeals.

Henry Lockney, for the appellant.

D. J. Hemlock, for respondents.

SIEBECKER, J. The city commenced this action to restrain respondents from forcible and violent interference with the officers and employees of the city in making an improvement of that portion of the streets which pass over the property of respondents. From the foregoing statement of facts, it appears that the city officers and those acting under their direction began to rebuild a sidewalk in front of respondents' premises, and that respondent *J. M. Randles* forcibly obstructed them, destroying material and imple-

ments, and threatening personal violence to those engaged in executing the orders of the city. It is asserted in behalf of the city that its officers and others acting for it were lawfully engaged in grading the streets for rebuilding the sidewalk in front of respondents' premises, under the authority granted by sec. 925—204, Stats. 1898, as amended by ch. 173, Laws of 1899. It is therein provided:

"It shall be the duty of the owner of every lot or parcel of land, abutting upon an improved street or a street ordered to be improved, whereon the grading for a sidewalk has been done for ten days or more, to lay at his own expense, a standard sidewalk in front of the same, or one as good as the standard, to be approved by the board of public works."

It further provides:

"Whenever the board of public works shall have declared any sidewalk, or part thereof unsafe, defective, or insufficient and required the same to be removed and replaced with a new sidewalk," it shall be the duty of the abutting lot owner to lay a standard sidewalk, or one as good as standard, within three days after service of the order made by the board of public works requiring the removal and relaying of the sidewalk.

The succeeding section authorizes the board of public works to build and lay sidewalks whenever the lot owner shall fail to comply with the requirements of the preceding section, and the expense thereof shall be assessed upon the abutting lots and collected like other city taxes upon real estate It is argued that the city had the right to require respondents to rebuild this walk, on account of its insufficiency and want of repair, after having ordered Arcadian avenue permanently improved. Sec. 925—175, subch. XVIII, Stats. 1898, of the general charter law, gives cities the power to improve streets in the manner therein prescribed. Subch. XIX (secs. 925—201 to 925—207), of the same law provides how, in the construction and maintenance of sidewalks, these powers and duties shall be exercised by the city.

This chapter provides a scheme and method which must be followed in dealing with this class of city improvements. The city's powers are fixed by those grants, and it must follow them as thereby granted. Under these provisions, the expense of every original construction and relaying of walks is chargeable upon the lots abutting on the improved part of the street. This liability on the part of the lot owner makes him an interested party to the proceedings, and vests him with the right to insist that the course of action prescribed be followed by the representatives of the city in executing and carrying out such improvements. These provisions limit and restrict the city to the course prescribed, in constructing, maintaining, and improving sidewalks; and any departure therefrom invalidates its action, and makes the city liable for injuries resulting from the illegal proceedings. This rule was established and has been adhered to since the decision in *Crossett v. Janesville,* 28 Wis. 420. *Dore v. Milwaukee,* 42 Wis. 108; *Hall v. Chippewa Falls,* 47 Wis. 267, 2 N. W. 279; *Addy v. Janesville,* 70 Wis. 401, 35 N. W. 931; *Drummond v. Eau Claire,* 79 Wis. 97, 48 N. W. 244; Id., 85 Wis. 556, 55 N. W. 1028; *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565.

The general powers conferred by sec. 925—125, Stats. 1898, to improve streets by maintaining sidewalks, are therefore restricted and limited so as to harmonize with the provisions of subch. XIX (secs. 925—201 to 925—207), providing how they shall be executed and carried out. *Crossett v. Janesville, supra; Drummond v. Eau Claire, supra; Jorgenson v. Superior, supra.*

Were the city officers, and those acting under them, acting within the law, when they attempted to grade and build a sidewalk on Arcadian avenue in front of respondents' property? They seek to justify their acts under the order of the board of public works. It appears this board, by order, condemned the sidewalk as insufficient and unsafe on July 15,

1902; that the permanent improvement of the street was ordered on August 5th following; that respondents were served on August 20th with the order of July 15th, and with notice to grade the street and rebuild a standard tar sidewalk on the established grade in place of the former one within three days, which they refused to do. On August 25th the board of public works let the contract for the improvement to Herman Wilkie, who undertook to carry it out on the following day, but was prevented by respondents. It appears that the city officers had done nothing to grade the street under the order of August 5th for the permanent improvement of Arcadian avenue, and that they contemplated extensive grading of the sidewalk portion of this street to make it conform to the established grade, and build a standard tar sidewalk; that the grading required filling to the depth of from five to six feet, and cutting down to a depth of about two feet. From these facts the inference is irresistible that these improvements were extensive and permanent in nature, and must have been designed to conform to the general improvement of the street under the order of August 5th. Any other inference would lead to the unjustifiable result of imposing the heavy and burdensome expense on respondents of an improvement permanent in nature under the claim that it is a repair of the sidewalk for temporary use until the contemplated permanent improvement be executed. In the light of these facts, it must be held that respondents could not be required to do the grading and build the walk prescribed by the order of July 15th by the board of public works under the provisions authorizing the rebuilding of an insufficient and defective walk, for it must be deemed a part of the permanent improvement of the street. This gave respondents the right to insist that the grading of the sidewalk should be so considered, and be let by contract with the other work on such street, and that the expense thereof should be provided for and borne in all respects like that of improving

the street, and that they have ten days or more after such grading be completed to lay a standard sidewalk at their own expense. It must follow that the action of the city officers, and those under their direction, undertaking to grade the sidewalk and lay a standard tar walk, is illegal. Being illegal, they cannot appeal to a court of equity to aid them in executing the unauthorized proceedings of the board of public works.

By the Court.—The judgment is affirmed.

YOUNKIN and others, Appellants, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Respondents.

January 14—February 2, 1904.

Street railways: Operation of interurban cars on city street: Additional servitude: Eminent domain: Equity: Injunction.

1. A street railway incorporated under ch. 86, and secs. 1862, 1863, of ch. 87, Stats. 1898, operating under ordinances forbidding use for any other purpose than that of a passenger railway within the streets of the city, except carrying such personal effects as are usually carried by passengers on street railways, and limiting the fare to be charged for each passenger, has the right to maintain its tracks and railway on the city streets, for the purpose of doing a legitimate street-railway business, without making compensation to abutting lot owners.
2. Defendant operated interurban trains and cars over country highways between two cities, thence on its street-railway tracks through one city over a street to its limits, and thence over country highways to a point six or seven miles distant. *Held*, that the running of such interurban trains and cars over the street-railway tracks was an additional burden upon the lands of lot owners abutting on the streets so used.
3. Prior to the enactment of ch. 465, Laws of 1901, street railways had no right to condemn land in the streets of cities and villages. In an action commenced before that enactment it was *held*, that the only adequate remedy of abutting lot owners was to enjoin the unlawful casting of additional burdens on

their premises. Such decision is limited, however, to the conditions at the time the action was commenced.

4. In equity the mere fact that the complaint demands judgment for relief to which plaintiffs are not entitled is no ground for refusing the relief to which they are entitled.

APPEAL from a judgment of the circuit court for Waukesha county; JAMES J. DICK, Circuit Judge. *Reversed.*

This action was commenced July 26, 1900, by twenty-six abutting owners on Lincoln avenue, in the city of Waukesha, to abate and remove from that street in front of their respective lots the railway tracks, ties, poles, wires, and other erections of the defendant therein constituting the nuisance complained of, and to restrain the further obstruction or interference therewith. The case was here on demurrer, and was reversed and remanded for further proceedings according to law. 112 Wis. 15, 23, 87 N. W. 861. Thereupon the complaint was amended in the particulars wherein it was held bad in that decision. The defendant answered such amended complaint, and denied that it was a commercial railway to carry baggage or freight, and justified its maintenance of the railway tracks, etc., and its right to use the same and operate its cars thereon, under the statutes of this state therein cited and the ordinances of the city of Waukesha. A trial being had, the court found as matters of fact, in effect: (1) That the plaintiffs were abutting owners as stated. (2) That Lincoln avenue was one of the principal public streets in the city, with desirable lots for residences thereon. (3) That at the time of the commencement of this action the defendant was, and since has been, incorporated under the articles of incorporation in evidence, and has all the rights, title, and interest conferred and granted by said ordinances and amendments. (4) That July 27, 1897, the city, pursuant to sec. 1862, S. & B. Ann. Stats., and acts amendatory thereof, granted a franchise to the defendant and its successors and assigns incorporated and organized

under ch. 86 (secs. 1771 to 1791*m*), of the statutes, and secs. 1862 and 1863 of ch. 87 of the statutes, and acts amendatory thereof and supplementary thereto, for the purpose of purchasing, acquiring, constructing, equipping, leasing, maintaining and operating by electricity or other power street railways for the transportation of passengers in the city of Waukesha, and of purchasing, acquiring, taking, holding, and operating real and personal property, rights, privileges, ordinances, and franchises upon certain streets therein, as found by the court. (5) That the defendant holds such rights, franchises, and property by assignment, as it is authorized to do. (6) That the defendant is the legal owner of such rights, franchises, and property, and had before and ever since the commencement of this action operated such railway under such franchise on such streets; that the defendant constructed such double-track electric railway on Lincoln avenue, and operated the same as an electric street railway within the city of Waukesha, and never has and never intended to use said street car line or double track for the purpose of carrying freight or baggage; and this defendant has in all its acts upon said Lincoln avenue and other streets mentioned in said franchise, within the city of Waukesha, kept strictly within the authority conferred upon it by said franchise and acts amendatory thereof so far as its business was concerned. (7) That the defendant has not by itself or agents entered upon the lots of any of the plaintiffs other than going upon Lincoln avenue under said rights and franchises. (8) That in doing so it has complied with all the conditions and requirements of its franchises. (9) That under such authority the defendant has constructed, equipped, maintained, and operated a first-class street railway line on Lincoln avenue, in the city of Waukesha, as authorized and required by its franchises and the statutes. (10) That the defendant constructed an electric line of railway from the city of Milwaukee to the city of

Waukesha, and connected the same with its street car line in the city of Waukesha in 1898. That the defendant purchased a line of electric railway from the city of Waukesha to a point on Pewaukee Lake known as "Waukesha Beach," about six miles in length, from another company, and the defendant connected such line with its said street railway in the city of Waukesha, and during the summer months has run and operated cars from the city of Milwaukee over and across said electric line to the city of Waukesha, and across said city of Waukesha and over and upon said Lincoln avenue in the city of Waukesha to the western limits of the city, doing a street car business within that city, and then on the line so purchased to Waukesha Beach; that all of said lines are of the overhead trolley system throughout its entire length, with wires strung from poles, charged with a heavy current of electricity; that up to August 1, 1900, there was only a single track on Lincoln avenue, and that was located in the center of the street, and consisted of T rails laid upon ties imbedded in the street; that about August 1, 1900, it was removed, and a double track was laid on Lincoln avenue, in accordance with the ordinance and franchise granted by the city of Waukesha to the defendant; that doing so rendered the property of the plaintiffs in some instances less easy of access than before; that in some portions of the year cars and trains ran directly over and upon said line over and upon Lincoln avenue in the city of Waukesha without change of cars, once an hour, in accordance with the franchise granted by the city of Waukesha—except on Sunday during the summer months, when cars are frequently run every half hour; that the number of passengers so carried exclusively within the city of Waukesha is not large; that the cars that are so run over and upon Lincoln avenue in the city of Waukesha do a regular street car business within that city. (11) That the defendant constructed its single track on Lincoln avenue, and placed its poles, wires, etc.,

thereon, without objection from any of the plaintiffs; that the first objection was made when the defendant began constructing its double tracks in August, 1900; that no compensation has ever been paid to any of the plaintiffs for the construction of such tracks on Lincoln avenue. As conclusions of law the court found, in effect, that the defendant is entitled to have the plaintiffs' complaint dismissed, and judgment for its costs and disbursements in this action, and ordered judgment accordingly. From the judgment so entered the plaintiffs bring this appeal.

Tullar & Lockney, for the appellants.

For the respondents there was a brief by *Ryan, Merton & Newbury,* attorneys, and *George P. Miller,* of counsel, and a separate brief by *Miller, Noyes & Miller,* and oral argument by *Mr. E. Merton* and *Mr. Geo. P. Miller.*

CASSODAY, C. J. 1. It is conceded that the defendant was incorporated, created, and organized under and by virtue of ch. 86 and secs. 1862 and 1863 of ch. 87 of the Statutes of this state and the laws amendatory thereof and supplemental thereto, prior to the commencement of this action. It is also conceded that prior to that time, and pursuant to such statutes, the defendant obtained from the city of Waukesha, ordinances giving to it "the right to construct, maintain, and operate street railways" upon certain streets therein named in the city of Waukesha, including Lincoln avenue, with single or double tracks. The ordinances required the defendant to construct and operate its railway line and tracks on the surface of the streets, and not to operate the same for any other purpose than that of a passenger railway within the streets of the city of Waukesha, except that they were thereby permitted to carry such personal effects as were usually carried by passengers on street railways, and that the rate of fare thereon should not exceed five cents for each passenger, except where cars are chartered at a special price or

for a special purpose. Such line of railway and tracks in the city appear to have been constructed as so prescribed by the city. In view of such facts it is very obvious that under the decisions of this court the defendant had the right to maintain its tracks and railway on Lincoln avenue for the purpose of doing a legitimate street-railway business without making compensation to any of the plaintiffs as abutting lot owners. Thus it appears that the decisions of this court culminating in *La Crosse City R. Co. v. Higbee,* 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923, are to the effect that such electric street railways, constructed and operated as so prescribed, are nothing more than an improved method of using the street to effect its original design. And so it was there held:

"A railroad constructed on the grade of a street, and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, or with private rights of abutting landowners, and for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden on the fee thereof. A railroad satisfies the above essentials, regardless of the motive power used, or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights."

2. A very different question, however, is here presented, as appears from the facts stated. It is undisputed that the defendant was incorporated, created, and organized as stated, and before the commencement of this action owned and operated a street railway from the city of Milwaukee westerly through the country to the easterly limits of the city of Waukesha, where it enters Lincoln avenue, and runs thence in a westerly direction through the city of Waukesha, and thence through the country in a northwesterly direction for

a distance of six or seven miles to Waukesha Beach, a summer resort on the shore of Pewaukee Lake. Under the repeated decisions of this court such street railroad upon the public highway between the cities of Milwaukee and Waukesha has been held to be an additional burden, which entitled the abutting landowners to compensation therefor. *Chicago & N. W. R. Co. v. Milwaukee R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575. In this last case the question was very carefully considered, and it was expressly held:

"An electric railway for the carriage of passengers between cities, which is constructed and operated upon a country highway, is an additional burden upon such highway, and its proprietors cannot, even with the permission of the town authorities, granted for the sole purpose of enabling them to do so, cut down the highway so as to seriously impair the rights of an abutting owner to access to his lot, without his consent, or the payment of compensation to him." See, also, *Krueger v. Wis. Tel Co.* 106 Wis. 96, 103–107, 81 N. W. 1041; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 511–513, 83 N. W. 851; *Allen v. Clausen,* 114 Wis. 244, 249, 90 N. W. 181.

Of course, the same is true as to the defendant's line of railway from the city of Waukesha to Waukesha Beach. It is conceded that the rule stated is applicable to the whole line from the city of Milwaukee to Waukesha Beach, except within the limits of the city of Waukesha. The defendant claims the right to run its trains and cars from the city of Milwaukee directly through the city of Waukesha and to Waukesha Beach. In doing so it is conceded that, while such trains or cars are interurban, they do cast an additional burden on the lands of abutting owners, which entitles them to compensation; but it is claimed that the moment such trains or cars pass into the city of Waukesha they cease to cast any such additional burden upon the lands of such abut-

ting owners. And yet such trains or cars may be loaded with through passengers. The only difference is that while in the city of Waukesha such trains or cars, in obedience to requirements, stop at street crossings, whereas in the country they only stop when convenient, or at points remote from each other. Counsel for the defendant argues that as a train or cars with passengers from Milwaukee might, at the city limits of Waukesha, change from such interurban cars to regular street cars, and then at the westerly limits of the city again change into interurban cars, that, therefore, it is substantially the same as though the interurban train or cars should continue with its passengers directly through the city; especially as the ordinance expressly authorized the street railway to connect with the interurban railway. While such argument may be plausible, yet it is really begging the question. It might be argued on the same theory that a commercial railway passenger train, with the permission of the city, might be run over the street railway tracks without compensation to the abutting lot owners. We must hold that the running of such interurban trains and cars over the street railway tracks upon Lincoln avenue was an additional burden upon the lands of the plaintiffs as such abutting lot owners.

3. Counsel for the defendant contend that the question is not properly before us on this appeal; that, if the running of such through cars on Lincoln avenue was improper, then that it was merely an abuse of the defendant's street railway franchise; and that, "if the plaintiffs have any remedy, it is to institute condemnation proceedings." But it was held on the former appeal:

"Prior to the enactment of ch. 465, Laws of 1901, street railway companies had no right to condemn land in the streets of cities or villages; and where a street railway was constructed without authority in such a street the abutting owners might resort to the ordinary actions for relief."

Younkin v. Milwaukee L., H. & T. Co. 112 Wis. 15, 19, 87 N. W. 861.

The result is that the only adequate remedy the plaintiffs had at the time of the commencement of this action was to restrain the defendant from casting such additional burden upon their lands as such abutting lot owners; and such right of action was common to all of them. Id. The facts were in issue, and all appear in the record, and are undisputed. The mere fact that the plaintiffs have prayed for relief to which they are not entitled is no ground for refusing to them the relief to which they are entitled. This decision must be regarded as limited to the condition of things at the time this action was commenced.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment in favor of the plaintiffs and against the defendant as indicated in this opinion.

MALONE, Respondent, vs. WAUKESHA ELECTRIC LIGHT COMPANY, imp., Appellant.

January 14—February 2, 1904.

Location of electric light poles: Abutting owners: Costs: Appeal: Affirmance and reversal.

1. Under sec. 925—88, Stats. 1898, the time and manner of using the streets of cities, for the purpose of placing electric light poles therein, is to be determined by the board of public works, subject to review by the common council. The defendant, operating under an ordinance or franchise passed by the common council, attempted to place an electric light pole in front of plaintiff's premises, without his permission, and in advance of any action by the public authorities except an order allowing the defendant to set *a pole* and string its wires on the side of the street on which plaintiff lived. *Held*, that until the city authorities had exercised the power given them, and

authorized a pole to be put at the point where defendant, against plaintiff's objection, did put it, plaintiff is entitled to an injunction restraining such action.

2. In an equity case costs are discretionary, and no abuse of discretion appearing, there can be no reversal of the judgment on that ground.

[3. Whether the placing of poles in a street by an electric lighting corporation for the purpose of placing electric light and heat wires thereon is an additional burden to the fee, so as to require condemnation proceedings, as against the abutting owners, not determined.]

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action in equity to enjoin the appellant company from placing an electric light pole in the street in front of the plaintiff's premises in the city of Waukesha, and from cutting or trimming the branches of the plaintiff's shade trees in the street. The plaintiff owns and occupies as a homestead a lot in the city of Waukesha with a frontage of 160 feet on Barstow street, and with a number of large shade trees in front of said lot. The defendant is a corporation engaged in furnishing electric light, heat, and power for public and private purposes in said city. March 13, 1902, the appellant entered into a contract with the city of Waukesha to light the city with electric light for five years, which contract specified the number and kind of lights to be used, the amount to be paid therefor, and contained provisions requiring the appellant to erect and maintain the necessary plant, poles, wires, etc. Just prior to the making of this contract the city council of the city of Waukesha passed an ordinance purporting to grant to the appellant for twenty years the right to enter upon the streets, alleys, bridges, etc., of the city, and operate and maintain on, over, and under the same poles, wires and the necessary apparatus for supplying electricity for light, heat, and power, subject to the general provisions of law in force, and also subject to the direction and supervision of the board of public works of the city

in the setting of poles and the placing of wires. Under this ordinance the board of public works made a written order June 4, 1902, authorizing the appellant to set poles, and place wires thereon, in certain streets of the city, as provided by said franchise, among which streets was a part of Barstow street, including that part on which the plaintiff's lot fronts, but the order did not specifically designate any particular places in the street where the poles should be put. In the early part of June, 1902, the appellant commenced to build the Barstow street line, and started to dig a hole for a pole on the plaintiff's side of the street at a point in front of the plaintiff's premises. To this the plaintiff objected, and after some talk between the plaintiff and the defendant's manager, it was agreed that the plaintiff's wife should settle the matter by agreement with the manager. The manager testifies that he agreed with Mrs. Malone that a pole should be permanently set at a certain point near an elm tree in front of the plaintiff's premises. Mrs. Malone, however, testifies that she made no agreement that a pole might be permanently set anywhere, but that the manager told her that a pole must be set somewhere upon that day; that there could be no delay; that he would put up a twenty-foot pole at the place near the elm tree, and would remove it whenever required—and that she consented to the temporary placing of the pole on those conditions. As matter of fact, it appears that a pole about thirty feet in height was put in the place thus selected, and that it remained there without wires until August 18, 1902, when defendant's workmen appeared and began to put arms on the pole, and to prepare it for the stringing of wires thereon. Thereupon the plaintiff objected, and ordered the pole removed, and commenced to cut it down. On the same day the board of public works made a written order allowing the appellant to set a pole and string wires on the east side of Barstow street between Main street and the alley (this includes the plaintiff's frontage), but specifying no particular

location for the pole. Plaintiff immediately commenced this action against the electric light company alone to enjoin it from putting the pole near the elm tree, and also to prevent the trimming of any of the branches of the plaintiff's trees, and obtained a temporary injunctional order to that effect. The defendant appeared in the action, and, in addition to a defense upon the merits, pleaded by way of abatement that the city should be joined as a necessary party defendant. In connection with the temporary injunctional order, the circuit court further ordered that the matter be referred to Court Commissioner Merton to recommend a place where the pole could be put pending the litigation, without injury to the interests of either party; and the commissioner reported, recommending a place near the point originally selected by the company. This recommendation was practically consented to by both parties, and the pole was put in that place, and has remained there since, with wires strung thereon. The case was tried by the court, and the trial judge, before making findings decided that the city should be joined as a defendant, so that any judgment rendered might be effective and binding on all parties concerned, and an order was made bringing in the city as an additional defendant. An amended complaint was served, and the city answered thereto; and the case came again to hearing and the evidence taken upon the first hearing was stipulated bodily into the case, with some slight additional testimony. The court, after finding the plaintiff's ownership of the lot, and the defendant's business and franchise, proceeded to find that the plaintiff's shade trees were of great value, and added greatly to the use and enjoyment of the plaintiff's homestead, and that any cutting or trimming thereof would cause irreparable damage to the plaintiff, for which he had no adequate remedy at law, and further:

"That on the 18th day of August, A. D. 1902, at the city of Waukesha, in the state of Wisconsin, the said defendant

Waukesha Electric Light Company, having been previously warned by the plaintiff not to interfere with his possession and the enjoyment of his premises, and the trees thereon, by its agents, servants, and employees, claiming to act by and under the direction of the city of Waukesha, and in accordance with the franchise to it granted by said city, and under the contract made with said defendant city, willfully, maliciously, and wantonly, and with intent to injure the plaintiff in the possession, and enjoyment of his property, went upon the premises of the plaintiff with force and arms, and against the consent of the plaintiff, and in derogation of his rights, started to place electric wires, to be charged with electricity, on a certain pole, of the probable height of thirty feet, placing cross-arms on said pole, among the limbs and branches of one of said elm trees; the said pole having been placed there fraudulently on or about the month of June, A. D. 1902, by said defendant light company, which said pole was placed in the ground a few feet from the base of said elm tree, so that the top thereof, and where the cross-arms are, and the wires were to be placed, were within the tree, requiring, and said defendant contemplated, the cutting of the limbs and branches thereof; said pole being located on the premises of the plaintiff, between the sidewalk and curb line; and the said defendant light company did then and there, without warrant or authority of law, threaten and attempt to place cross-arms on said pole for the purpose of stringing thereon live electric wires for the transmission of power for public as well as private purposes, in close proximity to the residence of the plaintiff, and did then and there threaten to commit personal violence on the plaintiff when endeavoring to protect his trees and property from the encroachments of said defendants; and that the defendants threatened that, unless restrained by injunction, they would continue to interfere with the plaintiff in the enjoyment of said premises, and will cut, trim, injure, and destroy the said tree, and other trees, and will greatly injure the homestead of the plaintiff, and that he has no adequate remedy at law in the premises, and that to proceed in the manner they intend and threaten would be of irreparable damage to the plaintiff. That all the allegations of plaintiff's complaint, except as modified by these findings, are true, and that the

placing of the said pole and the wires among the branches of the plaintiff's trees, and the cutting, mutilation, or trimming of the said tree or trees, was wholly unnecessary in order that the said defendant carry out its contract with the defendant city under the franchise hereinabove referred to. That said wires could be placed and strung without touching the trees of the plaintiff. (10) That the said defendants have not acquired the right to take or appropriate the premises and trees of the plaintiff by condemnation proceedings under the laws of the state of Wisconsin, nor has an attempt so to do been made. (11) That on or about the 4th day of June, A. D. 1902, the board of public works of said defendant city, by order, directed and authorized the placing of poles by the said defendant light company on Barstow street, without designating the point of location, nor the side of the street on which the same were to be placed; but, after the trouble had arisen between the plaintiff and the said defendants, the defendant light company was ordered to place a pole on the east side of Barstow street, and in fact the said pole has been there since June, and in the place so obnoxious to the plaintiff, herein complained of."

As conclusions of law, the court found that the plaintiff was entitled to have the temporary injunctional order made permanent, but that the appellant should have the right to place a pole at a point in front of the plaintiff's premises, forty-seven feet south from the southeast corner of Barstow and Main streets. Judgment was rendered in accordance with these findings against both defendants, but it was adjudged that the plaintiff recover costs of the appellant alone and from this judgment the appeal is taken.

T. W. Haight, for the appellant.

D. J. Hemlock, for the respondent.

WINSLOW, J. There is a very important question which might well have been litigated and decided in this case, and that is the question whether the placing of poles in the street by an electric lighting corporation for the purpose of placing electric light and heat wires thereon is an additional burden

upon the fee, so as to require condemnation proceedings, as against the adjoining owners. The question does not seem to have been seriously considered in the court below, and it has not been argued in this court; and, in view of its great importance, and the fact that this case may be properly decided without reference to it, we shall not take it up, but wait until it may be fully presented on argument and authority.

Conceding, for the purposes of the case, that the franchise granted by the city council gave to the electric light company the right to place its poles in the streets without condemnation, it did not give the right to place those poles anywhere that the company might choose, against the consent of the lot owner. Under the terms of the law governing this subject in cities of the class to which Waukesha belongs, the time *and manner* of using the streets for placing electric light poles therein *shall* be determined by the board of public works, subject to review by the common council. Sec. 925—88, Stats. 1898. Such, also, are the terms of the ordinance or franchise passed by the common council. There can be no doubt that, until the board of public works has designated the particular places where the poles are to be placed, the electric light company has no power, against the objection of the owner, to place a pole in front of a man's property. Until the city authorities have exercised the power given them, the property owner's right must be paramount. It appears by the findings in the present case, upon sufficient evidence, that neither the board of public works nor the city council ever authorized a pole to be put at the point where the company had put it when this action was commenced, nor did they ever authorize the trimming of trees for the purpose. Until such authorization had been made, the rights of the plaintiff must be considered to be absolute, and it follows from this that the judgment must be affirmed.

Costs were adjudged against the electric light company

alone, and this is assigned as error; but, as the awarding of costs is discretionary in equity cases, and no abuse of discretion appears, there can be no reversal of this part of the judgment.

A motion by respondent upon the argument to dismiss the appeal because of alleged defects in the notice and undertaking is overruled, without costs, and is not deemed of sufficient importance to require discussion.

By the Court.—Judgment affirmed.

DUFFY and another, Appellants, vs. HINKLEY and others, Respondents.

January 14—February 2, 1904.

Appeal and error: Trial by court: Findings when disturbed.

Findings of the trial court, unless against the clear preponderance of the evidence, will not be disturbed.

APPEAL from a judgment of the county court of Dodge county: J. A. BARNEY, Judge. *Affirmed.*

Action for compensation for professional services rendered in an action by Charles C. Grafton against the defendants. The amount claimed is $453.90. *L. D. Hinkley* and *M. J. Althouse* answered separately, denying that plaintiffs were employed by them or in their behalf in such action, but admitting that they were employed by the other defendants and alleging payment for the services rendered. Such other defendants answered separately, admitting the employment of plaintiffs as attorneys in two actions—the agreed compensation in the first being $200, and no agreement being made on the subject in the last one—and that plaintiffs rendered services in both such actions; and alleging that they had re-

ceived their disbursements and $400 besides, in all $728, the $400 being in excess of the reasonable value of services rendered in the second action, and the agreed price for services in the first. The cause was tried by the court, and resulted in findings material to this appeal to this effect: Plaintiffs were employed as attorneys in the case mentioned in the complaint and as therein mentioned. They performed services pursuant to such employment in the circuit court for Fond du Lac county, and in the supreme court, necessarily disbursing for defendants, in the course of the litigation, $86.60. The trial in the circuit court lasted a day and a half. The reasonable value of the services rendered, with the disbursements, is $386.60. Defendants have paid $352.70, leaving a balance due plaintiffs of $33.90, which they are entitled to recover.

Judgment was rendered accordingly.

For the appellants there was a brief by *J. G. Hardgrove*, and oral argument by *J. H. McCrory*.

For the respondents the cause was submitted on the brief of *C. E. Hooker*.

MARSHALL, J. It does not seem advisable to discuss the evidence in this case. The questions raised all relate to whether the findings are warranted by the evidence. The record has been carefully examined. We are unable to perceive that such findings are against the clear preponderance of the evidence, and therefore, by familiar rules, the judgment must be affirmed.

By the Court.—So ordered.

MERKEL, Appellant, vs. TOWN OF GERMANTOWN, Respondent.

January 15—February 2, 1904.

Highways: Culverts: Diversion of surface water: Authority of municipal officers.

1. **In an action against a town for damage, alleged to have been occasioned by surface water diverted from its former course, and conducted through a culvert, insufficient in size and improperly located, the complaint considered, and *held* to state no cause of action.**
2. **For the purposes of improving highways, a town has the same right to divert and obstruct the natural flow of mere surface water as private individuals.**

APPEAL from an order of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining the demurrer to the complaint.

The material facts alleged in the complaint are as follows: Appellant is the owner of premises used for agricultural purposes in the town of *Germantown,* Washington county. The premises lie on the south side of one of the highways of the town, and are at such a level, and lie in such relation to the lands at the north of the highway, that the waters of a considerable territory would naturally drain over them. The highway for a distance of about 400 feet is practically level, and has an embankment for the traveled track over this part of about two feet above the level of the land over which it passes. When the road was first improved, many years before this action was commenced, a culvert was built at a point where the surface slopes slightly in from both directions, at a place about 145 feet east of the northwest corner of the premises. This culvert was about twelve feet wide and two feet high. At a point about 410 feet further east was another culvert, about three feet in width and two feet

in height. Plaintiff's grantor had constructed a ditch across his premises from the larger culvert to the southwest corner of the premises for the purposes of carrying the surface water off quickly, and thus protecting the lands for agricultural uses. It appears that the surface waters from the lands lying to the north of appellant's premises were stopped in their flow by the raised highway, and flowed through the culvert, and but for the highway the waters would naturally spread and flow over a large part of appellant's farm. The natural course of the water was over the highway at the place and in the courses now complained of, but they are intercepted by the embankment in the highway. That portion over which the water came is almost a dead level. On the 13th of June, 1903, the town authorities filled up the larger culvert, and built a new one to the east of the place of the old one. This new culvert was about three feet and four inches wide by about two feet in height, and is alleged to be insufficient in capacity and improperly located to carry off the surface water which collected and flowed over that part of the highway north of the embankment. On July 17th, during a heavy rainfall, the surface water flowed into and filled up the ditch upon the northern side of the highway, and overflowed the roadbed of the highway between the point where the old culvert had stood and a point about 200 feet east thereof. The waters tore up the roadbed and carried the gravel into the ditch constructed by appellant to carry the water from the new culvert, filled the ditch, and carried gravel over corn and potato fields. The water also tore up the earth and carried off large quantities of it. Plaintiff further alleges that the last improvement was negligently planned and constructed, causing him damages to the amount of $800. The court sustained the demurrer to the complaint upon the ground that it failed to state a cause of action. From the order sustaining the demurrer, this appeal is taken.

For the appellant the cause was submitted on the brief of *P. O'Meara.*

For the respondent there was a brief by *Sawyer & Sawyer* and *J. C. Russell,* and oral argument by *Mr. E. W. Sawyer* and *Mr. Russell.*

SIEBECKER, J. It is conceded in this case that town authorities, for the improvement of its highways, may grade them by cutting or filling, and may construct bridges, culverts, and drains to accomplish this result, and that, if the flow of surface water is thereby diverted from or carried onto land out of its natural course, no action for damages arises therefrom, unless it appears that the improvement is not authorized in law, or was undertaken or executed in a wanton manner, without reasonable advantage to the public, and resulted in injury to private property. In *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775, the opinion exhaustively reviews the cases in this court upon the question. It is there asserted:

"The power of supervisors to determine upon a plan and method for improving streets and highways, and providing for the removal of surface water, is a discretionary one, and a mere error of judgment in respect to the plan will not subject the town to an action for damages. . . . The authorities are numerous that the determination of the public authority upon the plan for doing such a work is conclusive." Citing many cases.

The appellant's complaint shows that the surface water collecting on a large body of land lying to the north of the highway naturally flows over the highway onto plaintiff's land, and thence to the south. The former highway improvement raised the traveled track of the road about two feet above the natural surface for the distance of nearly 400 feet along his farm premises, and the surface water passed through a large culvert in the embankment, and thence flowed on his premises. In June, 1903, the town made im-

provements in the highway by removing this culvert, constructing a smaller one to the east. By reason of the change in location and size of the culvert, it failed to conduct the water from the north to the south of the embankment, which resulted in flooding the traveled track, and diverting the water from its former course over the road and his farm, and thereby caused him damages. These allegations furnish no basis of complaint against the town, inasmuch as the undertaking of respondent's officers was a lawful one, for the improvement of the highway.

Nor can the charge that the officers acted negligently and wantonly in making the improvement and adopting the plan aid the complaint, since the plan adopted to improve the highway is within the lawful right and authority of the town. For the purposes of improving its highways, a town has the same right to divert and obstruct the natural flow of mere surface water that the owners of private property have in improving their lands. *Champion v. Crandon, supra; Harp v. Baraboo,* 101 Wis. 368, 77 N. W. 744; *Hoyt v. Hudson,* 27 Wis. 656; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146.

The complaint fails to state a cause of action, and the demurrer was properly sustained.

By the Court.—Order affirmed.

RACINE WAGON & CARRIAGE COMPANY, Appellant, vs. LIEGEOIS and others, Respondents.

January 15—February 2, 1904.

Contracts: Pleading: Actions: Misjoinder of causes of action.

Joseph and Louis L., copartners doing business at A., and John L. doing business at S., entered a written order with plaintiff for its products, the contract being signed, "Jos. L. & Bro., John L.

Purchaser" which was accepted. The writing commenced "Please enter *our* order," etc., and contained directions as follows: "1-2 bill to Jos. L." at A., "1-2 to John L." at S. In an action for the unpaid balance of the whole order brought against the partnership and John jointly, the complaint considered, and *held* to be demurrable for misjoinder of causes of action, the contract being unambiguous and directing the goods specified to be charged one half to the firm at A. and one half to John at S.

APPEAL from a judgment of the circuit court for Oconto county: SAMUEL D. HASTINGS, JR., Circuit Judge. *Affirmed.*

This is an appeal from a judgment based upon an order sustaining a demurrer to the complaint on the ground that it appears from the face of the complaint that two causes of action have been improperly united. The complaint alleges, in effect, that at all the times and dates therein mentioned the plaintiff was an existing corporation, having its principal office and place of business at Racine; that the defendants *Joseph* and *Louis Liegeois* were copartners trading under the firm name and style of "Joseph Liegeois & Bro.," with their principal office and place of business in the village of Abrams, in Oconto county; that January 13, 1902, the plaintiff and the defendants, and each of them, entered into a written contract for the sale of goods, wares, and merchandise by the plaintiff and the purchase by the defendants *Joseph* and *Louis Liegeois* in their copartnership name, and the defendant *John Liegois,* wherein and whereby the plaintiff agreed to sell, and the defendants, and each of them, agreed to receive and pay for, said goods, wares, and merchandise to the amount and value and in the sum of $1,056.40, in the words and figures set forth in said contract, a copy of which is thereto attached, and made a specific part of the complaint; that the plaintiff shipped and delivered the goods described therein between February 5, 1902, and March 28, 1902, and the same consisted of wagons and

buggies, with other vehicles, to the defendants, at Abrams, to the value and in the sum of $1,056.40; that the defendants received said goods, but that no part of the amount stated had been paid by the defendants, save and except $796.50, leaving a balance still due from the defendants, and each of them, of $259.90, which sum is long past due and owing over and above all legal offsets and counterclaims, and demands judgment acordingly. The material parts of the contract, of which a copy is so attached, are as follows:

"Little Suamico, 1—13—1902.

"To *Racine Wagon & Carriage Co.*, Racine, Wis.:

"Please enter our order for the following to be shipped to (Name) Liegeois Bros. ½ bill to each.

"Liegeois J. & Bro. (Address) Ship to Abrams, Wis.

"To be shipped on or about Feb. 15, or as soon thereafter as possible, at prices named below on board cars Abrams, ½ bill to *Jos. Liegeois*, Abrams, ½ to *John Liegeois*, Little Suamico."

This is followed by a description of the goods and the conditions of sale, among others, which are that:

"The title to the goods, and all proceeds of any sale of the same, . . . to remain in the name of the *Racine Wagon & Carriage Co.*, until the same are settled for with cash."

"This order is given subject to the acceptance of the *Racine Wagon & Carriage Co.*, at Racine, Wis.

"Jos. Liegeois & Bro., *John Liegois*, Purchaser.

"Accepted: 1—15, '02, at Racine, Wis., *Racine Wagon & Carriage Co.*, by Rich. Hall, Salesman."

The cause was submitted for the appellant on the brief of *Francis X. Morrow*, attorney, and *V. J. O'Kelliher* and *P. A. Martineau*, of counsel, and for the respondents on that of *Classon & Brazeau*.

CASSODAY, C. J. The question presented is whether the complaint alleges two causes of action—one against the two defendants composing the firm and doing business at Abrams, and the other against the defendant *John Liegeois*, doing

business at Little Suamico. The order contained a duplicate of the respective articles, and was signed by the firm and also by *John*. It is addressed to the plaintiff. It starts out by saying: "Please enter *our* order for the following, to be shipped" as stated. Such order was accepted by the plaintiff. So far we have a joint order and contract, and, as suggested by counsel for the plaintiff, if we eliminate from the contract certain other words, to be considered, and substitute therefor still other words, and then take such changes "in connection with the balance of the contract," we would "have a complete joint contract or purchase in every particular." The words and figures so sought to be eliminated are "½ bill to each," "½ bill to *Jos. Liegeois,* Abrams," "½ to *John Liegeois,* Little Suamico." Such words and figures were used by the parties to express their intention. We are not at liberty to eliminate them and substitute others. It is the business of courts to construe contracts, and not to make them. Of course, regard is to be had to the whole instrument, as applied to the facts and circumstances to which it relates. *Gibbons v. Grinsel,* 79 Wis. 369, 48 N. W. 255. As stated by the trial court in effect, the words quoted must be given some meaning. By them the signers of the order said to the plaintiff, in effect, While we join in this order, the goods are not to be billed to us jointly, but one half is to be billed to each party; that is to say, one half is to be billed to the firm at Abrams and the other half to *John* at Little Suamico. The word "bill" manifestly means, to "charge or enter in an account for future payment." Century Dict. To "book or charge on an account." Standard Dict. "An account of charges and particulars of indebtedness by the creditor to his debtor." 5 Cyc. 705. Such was the plain meaning of the words and figures as used in the contract. Being free from ambiguity, the construction of the contract was for the court. In fact, it is difficult to see how parol evidence could

change the construction. We must hold that the demurrer was properly sustained for misjoinder of causes of action.

By the Court.—The judgment of the circuit court is affirmed.

IN RE MIELKE.

January 15—February 2, 1904.

Certiorari: *Supreme court: Original jurisdiction: "Cannot be made elsewhere:" "Peculiar and satisfactory reasons."*

1. The business of the supreme court is confined to the exercise of its appellate jurisdiction, except in cases of applications where, "for peculiar and satisfactory reasons . . . they are not or cannot be made elsewhere."
2. The term "cannot be made elsewhere" refers to disability as to jurisdiction.
3. The term "peculiar and satisfactory reasons" refers to those circumstances rendering the exercise of jurisdiction elsewhere in the given case inadequate to remedy or prevent the wrong,—insufficient to afford any substantial remedy.
4. Mere importance of obtaining a speedy final settlement of a controverted question, even of a public nature, short of necessity in that regard to prevent irremediable loss of valuable rights, does not satisfy the call for peculiar and satisfactory reasons.
5. In the foregoing sense the rule as to the exercise of original jurisdiction here to review or control the conduct of other courts, the rule is that this court will not exercise such jurisdiction "when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort."
6. To the foregoing, in conformity to legislative policy, an exception is made as to actions against the state involving its revenues.

[Syllabus by MARSHALL, J.]

CERTIORARI to the county court of Milwaukee county: PAUL D. CARPENTER, Judge. *Writ quashed.*

Greta Mielke, by proceedings under the statute, was committed to the Wisconsin Home for Feeble-Minded February 12, 1901. February 20, 1903, upon a petition by the father of the girl to have the commitment and the proceedings leading up to the same declared void, the county court, assuming that it had jurisdiction of such a matter, exercised it and granted such petition. A writ of *certiorari* was allowed by one of the justices of this court to remove the proceedings in the county court to this court for review on jurisdictional questions. They were removed accordingly by a due and proper return of and to the writ.

The cause was submitted for the petitioner on the brief of the *Attorney General* and *L. H. Bancroft,* assistant attorney general, and for the respondent on that of *Fiebing & Killilea.*

MARSHALL, J. At the outset respondent challenges the right of the petitioner to the remedy invoked, upon the ground that there is a full and adequate remedy by proceedings in the county court of Milwaukee county, and that, under such circumstances, this court should not exercise its jurisdiction. We see no escape from that, otherwise than by directly or in effect overruling a long line of decisions. Counsel for the petitioner stand on *Hurlbut v. Wilcox,* 19 Wis. 419, where the rule was laid down that the business of the court would be confined to its appellate jurisdiction except in case of an application where, for "peculiar and satisfactory reasons . . . it is not or cannot be made elsewhere." It is insisted that the importance of the question here involved, as regards the administration of the statutory system for the protection and care of a large class of unfortunates, and the fact that a final decision can only be made here, should be deemed ample to satisfy the calls of that rule. If that were so, then a decision by a justice court, or any court of inferior jurisdiction, of a question of private right also involving necessarily a question of great public interest,

could be presented here directly for review, regardless of the facilities afforded for presenting the same to a circuit court having full jurisdiction to remedy any wrong committed, subject to a review upon appeal, and regardless of the fact that, subject to such review, not only is a complete remedy afforded in the circuit court, but a much more speedy one. True, it is important in many cases to have a final decision without the necessity of traveling the usual road to reach it; but if that were sufficient, coupled with importance of the question involved, whether from a public or a private standpoint, to warrant invoking the jurisdiction of this court, it would have to turn aside from the performance of its ordinary duties to such an extent as to seriously impair its efficiency to perform the same.

In many recent cases suggestions have been made as to the essentials to satisfy the rule as regards "peculiar and satisfactory reasons," mentioned in *Hurlbut v. Wilcox.* In *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081, jurisdiction was taken because of an entire miscarriage of justice in the court below on a matter of vast importance, where a remedy more expeditious than that afforded by appeal was absolutely necessary to prevent irremediable loss of valuable rights of many persons. It was said, in effect, that the petitioner had really no remedy except in form, other than that within the power of this court to afford by the exercise of its power of superintending control. Jurisdiction was entertained solely for that reason, it being said that where a timely remedy, full and complete except in so far as it is subject to review by this court, is afforded in the circuit court, jurisdiction of the latter should be invoked in the first instance. That has since been affirmed and reaffirmed. *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *In re Court of Honor of Illinois.*

109 Wis. 625, 85 N. W. 497; *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107.

In the last case cited it was said:

"This court will not exercise its jurisdiction when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of the state."

The exception to that, found in *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, is based, as will be seen by an examination thereof, on the legislative policy indicated by sec. 3200, Stats. 1898, that suits against the state, the successful termination of which in favor of the prosecutor would result in depleting the state treasury, should be brought in the supreme court.

It seems, in view of what we have said, that we should hold that the writ here was improvidently granted.

By the Court.—The writ of *certiorari* is quashed and the proceedings dismissed, with costs to respondent.

CUPPS, Plaintiff in error, vs. THE STATE, Defendant in error.

October 24, 1903—February 23, 1904.

Criminal law and practice: Murder in the first degree: Intent: Presumptions: Evidence: Burden of proof: Motive: Character: Exceptions: Instructions to jury: Appeal and error: Prejudicial error: Questions reviewed: Verdict: Impeachment: Misconduct of jurors.

1. If a person inflicts upon another a fatal wound, intending thereby to cause that other's death, and such intention is effected, there being no attending circumstances rendering the homicide justifiable or excusable, such person is guilty of murder in the first degree.

2. If a person takes the life of another by an act naturally calculated to produce that result, in the absence of any explanatory circumstance or circumstances rendering the homicide excusable or justifiable, or criminal in some degree less than the highest, or creating a reasonable doubt in regard to one of such contingencies, the law presumes that he intended the result effected and is guilty of murder in the first degree.
3. Proof that a person took the life of another by an act naturally calculated to effect that result *prima facie* establishes guilt to the fullest extent charged.
4. At the point last suggested the burden is cast upon the accused to rebut the *prima facie* case made against him to the extent indicated in No. 2, or the jury will be warranted in finding a verdict of murder in the first degree.
5. An apparent motive for the commission of a criminal offense is not an essential to a conviction thereof. Mere proof of motive does not of itself establish guilt, nor proof of want of motive establish innocence. Such proof is entitled to just such consideration in arriving at the truth of the matter as the jury think ought to be given thereto; and the same principle governs in respect to proof of the character of the accused prior to the time of the alleged commission of the offense inconsistent with the truth of the charge.
6. If a jury, upon the whole evidence produced for their consideration in a criminal case, believe the accused guilty beyond a reasonable doubt, it is their duty to so find, regardless of whether they can discover therein an adequate or any motive for the commission of the offense; and also regardless of whether they believe that the character of the accused before such commission was inconsistent therewith.
7. An exception to a particular ruling striking out evidence as not responsive to the question asked, does not preserve for review the proposition of whether such evidence was competent, even though the trial judge expresses an opinion in connection with his ruling that it is not.
8. In giving instructions to a jury in a criminal trial, it is not reversible error for the judge to speak of facts as established in the cause which are so beyond any room for reasonable debate.
9. If a trial judge, in charging a jury in a criminal case, makes an incorrect recital of a fact as to whether it is established or not, if the evidence is all one way and so plain that there is no room in reason for the jury to misunderstand it notwithstanding the incorrect statement, the language of such recital being reasonably harmonizable with the truth of the matter, such mistake does not constitute reversible error.

10. In a prosecution for murder in the first degree, if the evidence in the judgment of the trial judge in any reasonable view thereof will not warrant a verdict of any other homicidal offense than that of murder in the first degree, it is his duty to so instruct the jury.
11. While it is the duty of the judge, in a prosecution for a homicidal offense, to instruct the jury as to every degree thereof to which the evidence, in any reasonable view of it, will apply, a failure so to do of his own motion does not constitute reversible error.
12. An exception to the charge, in a prosecution for murder in the first degree, that the accused should, on the evidence, be convicted of the full offense charged against him or acquitted, does not preserve for review the question of whether instructions should have been given as to other degrees of homicidal offenses.
13. The rule applies in criminal as well as in civil cases, that failure to instruct the jury upon a material point is not reversible error unless a written request to charge upon such point, in proper form to be given to the jury, is seasonably presented to the trial judge and the request is refused.
14. The court having charged the jury, in a prosecution for murder, that they should weigh the evidence of each witness "as best they can," and in the performance of the duty of "scrutinizing the evidence and determining its effect, you should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life," it is not error to refuse to instruct that in performing such duty, the jury should use "the utmost care, caution," etc.
15. It is not error to refuse to instruct the jury in a criminal case that, "unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt of the defendant's guilt, you should acquit the accused and render a verdict of not guilty," because, if the idea involved is not clearly erroneous, the language is fatally ambiguous.
16. The inclusion of a request to charge the jury as indicated in the preceding paragraph would render the entire request fatally defective.
17. The proper instruction, in substance, to give to the jury on the subject covered by the two last foregoing paragraphs is that, after giving to the evidence the consideration indicated by the instruction mentioned in paragraph 14, there then remains in the minds of the jury no reasonable doubt of the defendant's

guilt they should convict him, otherwise they should acquit him.

18. A requested instruction, so framed that in any reasonable view it assumes a state of things as established by the evidence not so established beyond room for reasonable debate, is fatally defective.

19. If counsel desire a specific instruction on any particular point, they should prepare such instruction in writing in the form they desire it to be given to the jury, and ask the court to give it. As a general rule a mere request to charge upon a particular point, or to charge more particularly thereon, a refusal thereof and an exception to the ruling, do not present any question for review.

20. Where the verdict of the jury is sought to be impeached for misconduct of some member thereof in respect to his answers upon the *voir dire*, or in respect to his conduct during the trial, or for undue outside influence upon the jury during the trial, the facts in that regard, to be effective, should be established by clear and satisfactory evidence.

21. The determination of the trial judge respecting the facts in regard to any matter referred to in the last foregoing paragraph is as conclusive as his determination upon any other matter of fact, in that it must be regarded on an appeal as a verity unless shown to be contrary to the clear preponderance of the evidence.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Clark county: CHAS. M. WEBB, Judge. *Affirmed.*

November 27, 1900, at about two o'clock a. m., Ollie O'Dell, the keeper of a house of ill fame, located a short distance from Stanley, Clark county, Wisconsin, was there fatally shot by some one. Death occurred a few moments after the wound was inflicted. There were no witnesses to the homicide except plaintiff in error and one Ole Gustad. They were jointly informed against as having with malice aforethought taken the life of Mrs. O'Dell. Separate trials were granted. Gustad was tried first and acquitted. Plaintiff in error was tried shortly thereafter and was convicted of the full offense charged. Judgment was pronounced accordingly. To review such judgment upon exceptions taken at

the trial, and thereafter, the cause was brought here by writ of error.

R. J. MacBride, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

The following opinion was filed November 17, 1903:

MARSHALL, J. The main contention upon which counsel for plaintiff in error relies for a reversal is that the evidence was not sufficient to warrant a conviction of murder in the first degree if of any offense; though it does not seem to be urged with confidence but that the evidence justified a conviction of guilty of some homicidal offense. Preliminary to the discussion of such contention we will briefly state the salient evidentiary facts which the testimony either established or so strongly tended to prove as to warrant the jury in finding their existence.

Ole Gustad and plaintiff in error were young men. The latter was about twenty years of age. He lived a reputable life till about a year prior to the homicide. Gustad was twenty-three years of age. For several years prior to the homicide he had associated with bad characters and generally lived a disreputable life. In June, 1899, or a month or two prior thereto, plaintiff in error, at St. Paul, Minnesota, began to associate with Iva Drake, an unmarried woman, knowing that she was of bad character and pregnant. She gave birth to a child shortly after such acquaintance commenced. He married her prior to July, 1899. During the time he associated with her prior thereto she had a companion of bad character by the name of Ella Day, a favorite of Ole Gustad. The acquaintance of plaintiff in error with the latter commenced after he began to associate with Iva Drake. After that event the two young men chummed together, more or less, till after the homicide. After plaintiff

in error and the Drake woman were married they spent several months going about from place to place, apparently not having any honorable means of support. In company with Ella Day they arrived at Stanley in the latter part of October, 1899. On the morrow a livery rig and driver were procured, and the two girls with plaintiff in error, were driven out of the village, a short distance, to Mrs. O'Dell's house of ill fame. Plaintiff in error knew the character of the house. He left his wife there apparently consenting that she should remain and encouraging her to do so and to live the life common to such places, he returning to Stanley, where he resided for several weeks doing nothing but taking care of a little child of Ella Day, the two girls paying his expenses from the fruits of their immoral life. At the end of that period Gustad joined him and the two went to St. Paul to obtain work. About a week after they arrived in St. Paul they returned to Stanley, leaving St. Paul on the evening train of November 26th, and arriving in Stanley a little before twelve o'clock p. m. of that day. *Cupps* had upon his person a revolver. Gustad had no weapon. When the two arrived at Stanley they avoided being observed by the train crew. When the train moved out of the station they went into the waiting room of the depot and sat down by the stove, indicating by their manner a disposition to avoid being recognized. After remaining there about an hour, at the suggestion of *Cupps* they started for the O'Dell place, where they arrived at about two o'clock a. m. One of them immediately rapped at the door and it was promptly opened by Mrs. O'Dell. She was the only person in the lower part of the house. Mrs. Cupps, the Day girl, and one Anna Wing were upstairs and were the only occupants of the house except the O'Dell woman. The Day girl was in a room by herself at the head of the stairs. As soon as Mrs. O'Dell opened the door a noise as of persons entering the house was heard, and immediately thereafter the O'Dell

woman was heard to exclaim: "My God, don't shoot me!" or words to that effect. Immediately thereafter a pistol shot was heard, followed by an exclamation from the woman: "They have killed me, they have killed me!" or words to that effect. Sounds as of the persons who entered the house hurriedly leaving the same, were then heard. The woman was then heard to groan several times, and thereafter all was still in the lower part of the house. The girls remained upstairs till morning. They then called to a passer-by, resulting in an investigation being made and Mrs. O'Dell being found where she was last heard, lying upon the floor dead, with a pistol wound in her neck. Immediately after the shooting *Cupps* and Gustad hurriedly returned to Stanley, where they secreted themselves behind some box cars till a train arrived, bound for St. Paul. They boarded the train, avoiding being observed by the train crew, and beat their way to St. Paul, arriving there before noon. Soon thereafter plaintiff in error sold his revolver, saying that he had no further use for it. About a week after they returned to St. Paul the two men were arrested, charged with being guilty of the murder of the O'Dell woman. After the arrest plaintiff in error claimed that he was not at Stanley on the night of the homicide. On the preliminary examination he admitted that he and Gustad visited Stanley on the night of the homicide and that they both started for the O'Dell place. He claimed, however, that he had some altercation with his companion, which resulted in his turning back while Gustad went on; that he was not present at the O'Dell place at the time of the shooting; that Gustad overtook him before he arrived at Stanley and that the two soon thereafter reached Stanley, boarded a passing train, and went to St. Paul. He claimed that he did not know that the O'Dell woman was shot, but suspected it. His story in justice court was different in many respects from the one he told upon his trial in the circuit court. He then admitted being present when the

woman was shot and said that his testimony in justice court inconsistent with that given upon his trial was false. He claimed that while the two were on their way to the O'Dell place Gustad borrowed his revolver ostensibly to shoot at something by the wayside; that he discharged the weapon and then reloaded it, having in his possession some cartridges which belonged to the accused; that he returned the revolver to the accused shortly after they left the O'Dell place. He testified that as soon as they entered such place Gustad drew the revolver and shot the woman; that he was then about to go upstairs in search of his wife, and that the woman, when shot, was directly between him and Gustad, facing the latter. Gustad denied having the revolver in his possession on the night of the homicide at all. He testified that plaintiff in error, as soon as they entered the O'Dell house, drew his weapon and shot the woman. Both agreed that immediately after the shooting they hurriedly returned to Stanley, secreted themselves till a train came along, and then boarded the same for St. Paul, reaching there as before stated.

The foregoing statement seems to be sufficient, without argument, to answer counsel's contention that there was no evidence produced upon the trial to warrant the jury in finding a verdict of murder in the first degree. True, the direct evidence as to who did the shooting was confined to the two men, the accused and his companion, who were the sole witnesses of the homicide; but there were evidentiary circumstances tending to show that plaintiff in error was the guilty party and that the two visited the O'Dell place upon the night of the homicide, one or both being bent upon an unlawful purpose of a serious nature, and probably the one that was effected. There was the evidence tending to show that both endeavored to avoid recognition while at Stanley; that they purposed, before leaving St. Paul, to go to Stanley and return in such a way as to render their absence from St. Paul unobservable; that plaintiff in error was the leader of the

expedition; that he owned and was in possession of the weapon with which the homicide was committed, and that his story of the shooting was highly unreasonable in that he claimed that, when Gustad fired the shot, the woman was standing in a direct line between them, face to face with Gustad. As before stated, however, on the question of who did the shooting, we do not understand that counsel for appellant contend but that there was evidence to warrant the jury in finding that plaintiff in error did it; the point argued being that no evidence was produced showing that the shot was fired with the intention to take human life, requisite to the crime of murder in the first degree. To our minds the evidence on that point seems to have been ample to warrant the jury in the conclusion which they reached. The location of the wound indicates that it was inflicted with a pistol pointed at the woman's neck and probably slightly downward. Whoever fired the shot must have had his arm raised to a position quite inconsistent with an accidental discharge of the pistol during a struggle between him and the woman. There were no powder marks upon the deceased, indicating quite clearly that she and her assailant were not near enough together at the time of the homicide to be in physical touch with each other. The location of the wound and the other circumstances strongly indicated that the wound was intentionally inflicted. It was in a vital part of the body, giving rise to the familiar legal presumption that whoever inflicted it intended to produce the result which followed, such result being a natural and probable consequence of the act. Add to that the fact that the woman exclaimed the instant before the shot was fired, "My God, don't shoot me!" and exclaimed immediately after the discharge of the pistol, "They have killed me, they have killed me!" or words to that effect, and we have a pretty strong showing that whoever fired the fatal shot did so intending to accomplish what in fact resulted. That satisfies all the essentials of murder in the first degree,

though there may not have been any definite or considerable period of time between the formation of the design to kill and the effectuation thereof. It is sufficient to satisfy the statute if the person committing the homicide has, at the time of inflicting the fatal wound, a design to take human life, and inflicts such wound with the purpose of accomplishing such design, and that death ensues, there being no circumstance to render the homicide excusable or justifiable. *Hogan v. State,* 36 Wis. 226, 244; Id. 30 Wis. 428; *Perugi v. State,* 104 Wis. 230, 80 N. W. 593.

While, on account of the evidentiary circumstances to which we have alluded, aside from the fact of killing by means naturally calculated to effect death, the case as to the degree of criminal homicide of which the person who fired the fatal shot was guilty, did not depend upon the presumption arising from the fact of killing and the manner thereof, in that it was by means naturally and probably calculated to produce death, if it did so depend we could not agree with counsel that such presumption goes only to the question of whether the homicide was criminal or not; that it was not sufficient to prove the character of the offense. From the circumstance of the taking of the life of a human being by the act of another naturally and probably calculated to cause that result the law presumes that such person, when he perpetrated the act, foresaw and intended the result which followed, hence must be guilty of the highest offense of criminal homicide known to our law, in the absence of evidence showing that the homicide was justifiable or excusable, or sufficiently rebutting the presumption of intent to take human life, to raise a reasonable doubt on the question. That must be so, since under our statute every intentional taking or human life not excusable or justifiable is murder in the first degree. *Perugi v. State, supra.* When it is made to appear in the prosecution of a case like this that the accused fired the shot, the weapon being aimed at a vital part of the

body, and that death ensued as a natural and probable result, the presumption of fact as to intention to take human life, in the absence of any explanatory circumstance or evidence, makes a *prima facie* case for the prosecution. The state is not bound to go further and negative any probability that the occurrence was the result of accident, or that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it altogether. The accused at that point must take up the burden of rebutting the *prima facie* showing made against him. He must show, by evidence at least sufficiently convincing to raise a reasonable doubt as to the intention to take human life or as to whether such taking was justifiable or excusable, that there was no such intention, justification or excuse, or the jury will be justified in finding him guilty of the highest offense of criminal homicide. That rule is elementary. We quote from 3 Greenl. Ev. § 14:

"This rule, that every person is presumed to contemplate the ordinary and natural consequences of his own acts, is applied even in capital cases. Because men generally act deliberately and by the determination of their own will, and not from the impulse of blind passion, the law presumes that every man always thus acts, until the contrary appears. Therefore, when one man is found to have killed another, if the circumstances of the homicide do not of themselves show that it was not intended, but was accidental, it is presumed that the death of the deceased was designed by the slayer; and the burden of proof is on him to show that it was otherwise."

That burden is successfully raised, as we have seen, if the accused produces evidence sufficient in the judgment of the jury to raise a reasonable doubt as to the felonious intent. This subject was very fully discussed by Chief Justice SHAW, in *Comm. v. York,* 9 Metc. 93. The conclusion there reached is fairly stated in the syllabus thus:

"When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant,

and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant."

By reference to the opinion it will be seen that the term "murder" in the syllabus means killing with malice aforethought, or murder in the first degree under our statute. That is stating the rule broader than is necessary for the purposes of this case, and broader than we would advise giving it to a jury. The better way is to state that, in the absence of evidence to the contrary, he who takes the life of another by the infliction of a wound or some act naturally and probably calculated to produce death, is presumed to have intended that result and to be guilty of murder at the common law, and murder in the first degree under our statute. Chief Justice SHAW, speaking of the nature and force of the presumption, said:

"The willful and voluntary act of destroying the life of another is . . . injurious in the highest degree to the rights of such other. . . . The natural and necessary conclusion from such an act willfully done, without apparent excuse, is that it was done *malo animo,* in pursuance of a wrongful injurious purpose, previously, though perhaps suddenly, formed, and is therefore 'a homicide with malice aforethought.'" Page 104.

"The presumption of malice . . . is not technical or artificial, . . . but is the result of a mode of legal reasoning which is of general application." Page 105.

Counsel for plaintiff in error freely admits that the law is as thus stated as applied to murder at the common law, but insists that the rule is different under our statutory system. No very good reason is advanced to support that idea, and no authority in support thereof is cited. Murder at the common law was susceptible of being established solely by the presumption arising from the fact of killing by an unexplained act naturally and probably calculated to produce death. That was laid down distinctly as early as *King v.*

Woodburne, in 1722, 16 How. St. Tr. 54. We see no room for holding that such ancient rule, which obtains to this day, admittedly, as to murder at the common law, does not apply to our statutory murder in the first degree, since that includes every intentional killing of a human being by another, not justifiable or excusable. Decisions made under systems unlike ours necessarily cannot affect the question. The law is different in the state of Ohio, and perhaps in other states. The difference in Ohio, however, grows solely out of the fact that intentional killing under the Ohio statutes is a characteristic of murder in the second as well as in the first degree. In that situation the court held that the presumption of intention to take human life arising from an unexplained homicide should only go to the lowest degree of the offense in which the intent to kill was essential. *State v. Turner,* Wright (Ohio) 20.

Now, while the jury were warranted in finding many evidentiary circumstances corroborating the legal presumption from the fact of killing by an act naturally calculated to produce that result,—which we have seen was of itself, unexplained, sufficient to support the finding of the taking of human life with malice aforethought,—we are unable to discover any evidence or circumstance tending to rebut the presumption except that tending to show absence of motive. True, there was a feeble attempt to show a probable accidental discharge of the pistol, and, certainly, from the circumstances of the homicide which we have detailed and the appearances thereafter the jury were fully warranted in giving little or no credence thereto. No explanation whatever was attempted of why the revolver was drawn on the defenseless woman at all; while the location of the wound and the absence of powder marks on the body of deceased or her clothing, and the entire absence of anything about her person indicating a struggle with her assailants, show pretty clearly, as before indicated, that the weapon was aimed at a

vital part of her body and was intentionally discharged by the person who held it.

Much significance is claimed for the dearth of evidence showing any substantial motive for the commission of the offense. If in a case like this evidence of guilt were so weak as to necessarily leave a reasonable doubt in the mind on the question of guilt in the absence of any proof of motive for the deed, that circumstance would have all the significance claimed for it; but such is not the situation here. Absence of motive in a doubtful case is always significant and may be of controlling import. But where the evidence, in the judgment of the jury, clearly establishes an intention, without justification or excuse, to destroy human life, the fact that no adequate or any motive can be assigned for the deed does not militate against such act being criminal, nor against the degree of criminality being the highest known to the law. A conviction is never to be disturbed merely for want of motive where there is credible evidence of guilt. 1 McClain, Crim. Law, § 416. The expressions of courts on this subject are numerous and harmonious. In *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, it was said, in effect: Proof of motive for the crime is not indispensable to conviction; for murder may be inferred from the mere fact of killing; but the absence of evidence suggesting a motive is a circumstance in favor of the accused to be given such weight as the jury may deem proper. In *Clifton v. State*, 73 Ala. 473, the court said:

"The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry. . . . But it is not in any case indispensable to a conviction; it is not an element of the burden of proof the law devolves upon the prosecution, whether the agency or connection of the accused is manifested by direct and positive evidence, or only by circumstantial evidence, that a motive, or inducement, to commit the offense should be proved. The criminal act, and the connection of the accused with it,

being proved beyond a reasonable doubt, the act itself furnishes the evidence, that to its perpetration there was some cause or influence moving the mind."

In *McLain v. Comm.* 99 Pa. St. 86, 99, the court, speaking on the same subject, said:

"The commonwealth was not bound to establish an adequate motive for the alleged crime. . . . The fact of murder being established the inability to discover the motive does not disprove the crime."

Thus it will be seen that while it is competent for the prosecution in a case of this kind to show motive, it will not of itself establish the charge; and while it is competent for the defense to establish want of motive, it does not constitute a defense, nor necessarily rebut evidence by itself satisfactorily establishing the guilt of the accused even so as to raise a reasonable doubt on the question. Presence or absence of motive in any case, as indicated, is but a mere evidentiary circumstance to be given just such weight by the jury as they deem the same entitled to under all the circumstances. So here, the failure of the prosecution to show any motive for the commission of the offense charged against the accused is of little moment, the jury having presumably given due weight thereto and the evidence being sufficient, notwithstanding the absence of any discoverable motive for the offense, to warant the verdict which was rendered.

Counsel for plaintiff in error, to sustain his contention that the verdict of the jury was not warranted by the evidence, points with confidence to the proof of previous good character of the accused up to about a year before the commission of the offense. We must say that such evidence of good character was entitled to very little if any weight in view of the proof that the accused was a man of mature years, more than ordinarily bright, a man capable of earning upwards of $60 per month at mechanical labor, and yet that he took for his wife a common prostitute knowing her char-

acter, and thereafter encouraged her to continue her immoral life, he profiting by the fruits thereof, and it further appearing that he indulged in going about the country, beating his way on railroads and living the life of a common tramp. However, at best the evidence of good character did not constitute a defense. Counsel for the accused of course does not claim that for it. It was entitled to just such consideration as the jury thought proper to give to it under all the circumstances of the case,—no more and no less. The fact of previous good character, like that of absence of motive for the commission of the crime, is of no significance in any case in the face of satisfactory evidence of guilt, in the judgment of the jury, after giving due weight to such previous character. We must assume that there was such satisfactory evidence in the judgment of the jury in this case, since there is nothing to indicate that they did not give due weight to all the evidence produced before them. If they believed from such evidence beyond reasonable doubt that the accused committed the offense charged against him, it was their duty to render the verdict which they did, though they could not discover any motive for the deed, and though they believed that prior to the commission of the offense his character was inconsistent with such commission.

The only error assigned to rulings on evidence is that the court erred in granting a motion to strike out an answer which it appears was not responsive to any question asked. Arnold Lunt, after qualifying to testify as to the reputation of the accused as a peaceable, law-abiding citizen prior to the commission of the offense, in answer to a proper question said that it was good. Counsel for the accused, apparently to cause the witness to emphasize his answer to this question, asked: "His reputation in that respect was good?" referring to the reputation of the accused as a peaceable, law-abiding citizen, to which witness said: "In every respect it was good." That answer was clearly subject to the mo-

tion to strike out. The motion was general. The specific ruling of the court was that the answer should be stricken out so far as not responsive to the question. True, the court said in connection therewith that the inquiry in respect to the character of the accused was only competent in respect to his reputation as being a peaceable and law-abiding citizen; but the ruling was as indicated. An exception to that did not raise the question which counsel argues. Whether the saying, as to a person on trial for the crime of murder, that only his character as a peaceable and law-abiding citizen is involved, is strictly accurate, does not seem to arise so as to require discussion or decision.

The learned circuit judge, in the instructions to the jury, recited numerous facts as to which the evidence was all one way and which were unquestionably established, in which he said that after the homicide the accused and his companion walked back to Stanley. Counsel insists that such recital was an invasion of the province of the jury and was clearly prejudicial to the accused in respect to the statement that he and his companion walked back to Stanley, the testimony being that they ran back, indicating mental excitement. As to the general claim that it was error for the court to speak of facts as established in respect to which there was no debatable question, that was not an invasion of the province of the jury. Strictly speaking, the statement made by the learned court that the accused and his companion walked from the O'Dell place to Stanley was contrary to the evidence. The only testimony on the subject was that of accused and his companion. It is true, as counsel for plaintiff in error states, that both testified that they ran. However, we fail to see how the jury could reasonably have been prejudiced by such inaccurate statement. The men returned on foot to Stanley immediately after the homicide. In all reasonable probability, in view of the evidence, which was undisputed and very plain, that is what the jury understood

was in the mind of the court. The act of running back to Stanley, after the homicide, in a state of excitement, was certainly more indicative of guilt than would have been an act of walking back with the unconcern which the language of the court would indicate, taking the same in its literal sense. However, as before indicated, the evidence being plain and all one way that the accused and his companion returned to Stanley on a run, the jury must have understood the court merely to mean that they returned, as they in fact did, on foot.

Error is claimed because the court instructed the jury:

"There is no evidence in this case that tends to show, nor is any such claim made in the defendant's behalf, that the defendant killed the deceased under circumstances such as rendered such killing either justifiable or excusable. On the trial the defendant insists that he did not in any way contribute to the death of Mrs. O'Dell. The question therefore is to be determined by you from the whole evidence in the case, considered within appropriate legal rules as here stated by the court: Did the defendant shoot and kill Mrs. O'Dell, and, if he did, then was such killing perpetrated pursuant to a premeditated design by the defendant to take her life?"

That assignment of error raises the question of whether the court was warranted in taking from the jury the question of whether the killing of Mrs. O'Dell was justifiable or excusable. We are unable to perceive why the court was not so warranted, and the instruction objected to strictly proper. Counsel made no attempt to point out anything in the evidence indicating justifiable or excusable homicide. The whole attitude of the accused, from first to last, was, as the court said in the instruction, inconsistent with any other theory than that he was guilty of murder in the first degree or not guilty. His story was that he did not do the deed or have any concern with it. There was no room whatever in the evidence, in any reasonable view of it, for a finding that he had any legal excuse or justification for killing the

woman or injuring her in any way whatever. In that situation the court was justified, in fact it was its duty, to fence in the considerations of the jury as was done. A court in charging the jury in a criminal or any case is by no means confined to a mere statement of abstract principles of law applicable to the evidence. It may properly speak of evidentiary facts as established, as before indicated, as to which the evidence is so conclusive as not to leave any room for debate in respect thereto, and thus bring the minds of the jury to a definite understanding of the particular primary subjects for their consideration before taking up the ultimate issue of whether the accused is guilty or not. This and other courts have often held that where the evidence in a prosecution for murder in the first degree will support the full charge, and in no reasonable view of it will support a conviction for any less homicidal offense, it is competent for the trial judge to say that to the jury and to direct them to restrict their deliberations accordingly. *Fertig v. State,* 100 Wis. 301, 75 N. W. 960; *Dickerson v. State,* 48 Wis. 288, 4 N. W. 321; *State v. Kilgore,* 70 Mo. 548; *State v. Stoecklī,* 71 Mo. 559. The limitation upon the right of a trial court to speak of facts as established in charging a jury has often been said to be that it must stop where in any reasonable view of the evidence there is room for debate as to where the truth lies. *Benedict v. State,* 14 Wis. 423; *Hill v. State,* 17 Wis. 675; *Dingman v. State,* 48 Wis. 485, 491, 4 N. W. 668; *Salladay v. Dodgeville,* 85 Wis. 318, 326, 55 N. W. 696; *Little v. Iron River,* 102 Wis. 252, 78 N. W. 416. The general view of this subject as held by the highest courts of the country is summed up in 11 Ency. Pl. & Pr. 116, thus:

"An instruction which assumes the existence or non-existence of material facts in issue invades the province of the jury, and is erroneous if there be any evidence in conflict with such assumption."

That statement could be improved upon, it seems, by using the expression: "If there is any evidence or want of evidence in conflict with such assumption," since the court cannot properly assume the existence of a material fact merely because there is no negative evidence on the subject. The assumption in a criminal case must be based upon evidence establishing the fact so conclusively, as said in the decisions of this court before cited, as to leave no room for debate on the subject.

There is a further answer to that feature of the assignment of error last discussed which relates to the court instructing the jury to consider only the question of murder in the first degree: that, according to the repeated rulings of this court, the accused was not prejudiced, since no request was made for submission to the jury of other degrees of homicidal offenses than murder in the first degree. A general exception to the submission of only murder in the first degree did not raise the question of whether the lesser degrees of homicidal offenses should be submitted. The only way that could be done was by specially requesting the court to instruct the jury as to the lesser degrees. *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Fertig v. State, supra; Dickerson v. State, supra.* True, it is the duty of the court in the trial of such a case as this, to instruct the jury as to every homicidal offense to which the evidence, in any reasonable view of it, can apply. *Hempton v. State,* 111 Wis. 127, 86 N. W. 596. But, just as true, it is its plain duty, if the evidence in any such view will not support a conviction of any other homicidal offense than murder in the first degree, to say so to the jury.

The court refused to grant the request of counsel for the accused to instruct the jury that:

"It is your duty to scrutinize the evidence in this case with the utmost caution and care, bringing to that duty the reason

and prudence which you would exercise in the most important affairs of life, in fact all the judgment, caution and discrimination you possess, and then, unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt of the defendant's guilt, you should acquit the accused and render a verdict of not guilty."

The refusal of the court seems to have been based upon the ground that the idea intended to be conveyed by the request was embodied in the general charge by the following language:

"The jury are by law made the sole and responsible judges of the evidence; it is their duty to determine the weight and effect of the evidence as a whole and, as necessary to such determination, to recall and weigh the testimony of each witness and judge his or her credibility as best they can in the light of the whole facts as disclosed by the evidence. . . . In the performance of this duty, that of scrutinizing the evidence and determining its effect, you should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life. Having done this, if there then remains in your mind no reasonable doubt of defendant's guilt, you should convict him; otherwise you should acquit him."

Waiving for the moment the question of whether the requested instruction as a whole was a correct statement of the law, we will examine the counsel's contention. He concedes that the language used by the trial judge was a full equivalent for that requested save for the omission of the word "care." This court has not put its stamp of approval, nor has any other court, upon the precise language of the requested instruction, as to the use of that word, but has said repeatedly that the idea expressed in such instruction should be given to the jury, and if not given when requested the refusal constitutes reversible error. We are unable to see any substantial difference between the language of the court and

that which was requested. Perhaps it would be better to use the term "care and caution." If so, that would not constitute reversible error if the correct idea was in fact, in appropriate language, given to the jury. It would seem that when a jury is told that in examining the evidence they "should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life," there is nothing more that could be added. That seems to include the idea of utmost care and caution amplified so as to more clearly impress the idea upon the minds of the jury than would be done by the mere use of the term which counsel seems to think should have been used. In addition to the language last quoted, as will be noted, the jury were told that they should weigh the evidence of each witness "as best they can." There again, it would seem that they were told, in effect, that they should scrutinize the evidence with the utmost care and caution. On the whole we are unable to see any infirmity in the instruction along the line claimed by counsel for plaintiff in error. On the other hand it would seem that the requested instruction is not a correct statement of the law. The concluding part of the request seems to be fatally ambiguous, to say the least. This is the language to which we refer:

"Unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt of the defendant's guilt, you should acquit the accused and render a verdict of not guilty."

That would commonly be understood as meaning that, unless the evidence creates a reasonable doubt in the minds of the jurors as to the defendant's guilt he is entitled to an acquittal; while of course the law is that unless the evidence fails to impress the minds of the jury beyond every reasonable doubt of the defendant's guilt he is entitled to an ac-

quittal. The language of the trial court's instruction on that subject was very plain and strictly accurate. He said:

"If there then remains in your mind no reasonable doubt of the defendants guilt, you should convict him; otherwise you should acquit him."

Error is assigned on the refusal to give this instruction:

"The witness, Ole Gustad, according to his own statements, if they are true, was either an accomplice or an accessory after the fact. In such cases, courts advise the jury that, while they may convict on the uncorroborated testimony of such person, it is dangerous to do so and the evidence should be scanned with great care and caution, and so the court instructs you in this case."

It is sufficient, it seems, to justify the refusal of that instruction that it assumes that there was no evidence whatever in the case that the accused committed the offense other than that of Gustad. True, his was the only direct evidence on the question, but there was much circumstantial evidence pointing the same way, so that it was not proper to state to the jury that the state's case rested on the uncorroborated testimony of Gustad.

Further complaint is made that the court failed to instruct the jury in respect to the evidence tending to show that the character of the accused prior to the commission of the offense was inconsistent therewith. No request in writing was presented by counsel for the accused to be given by the court to the jury on the subject, so no proper foundation was laid for an exception to the failure of the court to instruct in respect to the matter. The rule is now firmly established that where the charge of the court does not cover all phases of the case counsel is bound to call its attention to the omission by an appropriate request or be precluded from making such failure available as reversible error. *U. S. Express Co. v. Jenkins,* 64 Wis. 542, 25 N. W. 549. That a mere verbal request made to the court for an instruction upon a particular subject is not an appropriate request within the meaning

of the decisions, cited, was pretty clearly held in *Karber v. Nellis,* 22 Wis. 215, where this language was used:

"If counsel desire a specific instruction on any particular point, they should draw such instruction and ask the court to give it. A mere request to charge more particularly upon some point, does not present any question for review here."

In a very late case, *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249, opinion by Mr. Justice DODGE, sec. 2853, Stats. 1898, was construed as requiring requested instructions to be presented to the court in writing. It was said, in effect, that the section contemplates such a presentation of a request as a condition precedent to the duty of the court to consider it. The significant language of the statute which led to that construction is this:

"Each instruction asked by counsel to be given to the jury shall be given without change or modification the same as asked or refused in full."

It was held that such language plainly indicates that the legislative idea was that requests to charge must be made in writing, each proposition being stated in the exact language which it is desired the court shall use, and that the court shall rule upon the precise statement of the law thus presented. So it was held that specific error can be assigned "upon a refusal to instruct a jury" only when such refusal relates to "an instruction formally requested in writing."

After verdict a motion was made for a new trial upon the grounds heretofore discussed, and, among others, that Charles Vick, one of the trial jurors, contrary to his statement under oath upon his examination on the *voir dire,* prior to his having been called as a juror having formed and expressed an opinion that the accused was guilty. In support of such motion Richard Townsend testified that he was the proprietor of a barber shop in Neillsville where the cause was tried; that Charles Vick, the juror, during the trial of Gustad and thereafter, visited his shop on two or more occa-

sions and there conversed as to both Gustad and *Cupps* and whether they were guilty or innocent; that on the first visit the trial of Gustad was about to be concluded; that Vick then said in conversation with, or in the immediate presence of, one Jackson, one of Townsend's employees, and in the hearing of Townsend, that he thought both Gustad and *Cupps* were guilty; that if he was on the jury he would so find. The witness said he was not then acquainted with Vick; that there were several persons in the shop, all the chairs being occupied; that during the trial of both *Cupps* and Gustad conversation in the shop was general in regard to the cases; that Vick visited the shop some days after the Gustad trial was concluded and when that of *Cupps* was about to commence, when he expressed the opinion that he would not be on the case because he heard the Gustad trial; that he was drawn for that trial and stricken off; that after the verdict was rendered against *Cupps* Vick again visited the shop, when the witness heard him say that he served as one of the jurors thereon; that he told the attorneys when he was called that he heard the Gustad trial and expected they would strike him off but that they did not. The witness said, further, that on all the occasions mentioned he merely overheard the statements to which he testified; that he did not himself have any conversation with the juror. Jackson, being sworn as a witness, testified that on the first occasion he remembered of Vick visiting the shop, all he said about the Gustad case was that he had been excused therefrom. Jackson further said that he did not remember of hearing Vick at any time make the statements testified to by Townsend; that on the occasion of Vick's visiting the shop just before the *Cupps* trial he merely said he did not think he would be drawn, as he heard the evidence in the Gustad trial; that Vick visited the shop after the *Cupps* trial, but that he could not recall anything the juror then said in respect thereto. George L. Jaques testified to having heard Vick say after

the *Cupps* trial that he stated on his *voir dire* that he heard a portion of the testimony on the Gustad trial, or formed some opinion, or something of that sort, and was surprised that they left him on the jury. Robert J. Glass testified that just after Vick had been struck off the Gustad jury he heard the latter say in the barber shop that he was glad of having been so struck off and that it was his opinion that both Gustad and *Cupps* should be punished. Vick testified that he did state in Townsend's shop that he had been struck off the Gustad jury, or that he heard part of the trial of Gustad; that he did not state prior to *Cupps'* trial in such shop or any where else, to any one, that Gustad and *Cupps* were both guilty or that *Cupps* was guilty; that he did not hear the testimony in the Gustad Case; that he was excused after the jury was impaneled, and went home, coming back about as such trial was concluded; that he heard the arguments of counsel and so stated on his *voir dire* when called in the *Cupps Case;* that he stated on one occasion that, whoever the guilty party was who killed the O'Dell woman, he should be punished, not stating whether in his opinion *Cupps* and Gustad or either of them did the deed. Upon that testimony the court held that Vick did not make any false statements when examined upon his *voir dire* in the *Cupps Case,* and had not prior thereto formed or expressed any opinion as to *Cupps'* guilt or innocence. There was evidence both ways on the question. That presented for determination a question of fact. The decision reached has all the conclusiveness upon this appeal of the determination of a trial court upon any issue of fact. That is, it cannot be disturbed unless it satisfactorily appears from the record to be against the clear preponderance of the evidence. *Carthaus v. State,* 78 Wis. 560, 47 N. W. 629. Evidence to impeach a verdict by attacking the fairness of a jury in such circumstances as that attempted in this case, to be effective, should be very clear and satisfactory. The court should not act upon it favorably

to impeaching the verdict in the face of an unequivocal denial of the juror, in the absence of the most clear and satisfactory evidence of the falsity of such denial. After verdict, especially in a capital case, the interests at stake, tempting an attack upon some particular juror, are so great, the ease with which such statements as those claimed here, made in casual conversations, may be varied honestly or otherwise, and thus a *prima facie* case be presented where none exists in fact, that all such evidence should be scrutinized with the greatest caution and care before passing judgment favorably thereto. The evidence against juror Vick was substantially all as to mere casual conversations. His unequivocal denial was opposed only by the evidence of one witness. There was definite evidence of two distinct statements made by him, one heard by Townsend upon the last day of the Gustad trial, and one by Glass upon the day the jury therefor was impaneled. It seems quite clear that the occasion testified to by Townsend was not the one testified to by Glass. So in each instance there was the evidence of the juror against that of one person, such opposing person not being definitely corroborated by any circumstance whatever, while the juror had in his favor a strong presumption of innocence. The witness Jackson, who, according to Townsend, would be most likely to have remembered the statement made by Vick which Townsend testified to, if it were in fact made, stated that he could not recall having heard the latter make any such statement. The testimony that Vick said to Jaques and others that he heard the evidence upon the Gustad trial is quite effectually overborne by the circumstance that he was not present during the taking of the evidence. He denied having stated, understandingly, that he heard the evidence but admitted being present during the argument to the jury. The effect of Jaques testimony is that the juror claimed that the statements made in his presence or to him in respect to such juror's knowledge of the Gustad trial, were substantially the

same as he made upon the *voir dire* when called in the *Cupps Case,* and there does not appear to be any definite evidence that such is not the case. It hardly needs argument to demonstrate that the finding of the trial court against the charge of unfairness as to juror Vick, upon such evidence cannot be disturbed. There is at least clear warrant for saying that such finding is not against the clear preponderance of the evidence. It seems that if such evidence would warrant granting a new trial because of the unfairness of a juror, there would be very little stability to verdicts in cases of great public and private interest, such as this.

Further complaint was made on the motion for a new trial, because one Cornelius, the register of deeds of Clark county, while on the way to his office passed the jurors on one occasion during the trial, in front of the courthouse, and that as he did so he said good morning and handed the officer in charge of them $1.25 or $1.50, with a request that he should expend the same for cigars for their use, and that the officer acted accordingly. There was evidence that Cornelius was in no way interested in the case, and that the act was purely one of goodfellowship which had no baneful influence whatever upon the jury. True, it would be better if no such attentions to a jury, especially while engaged in such an important trial as this, should occur. However innocent the person giving them may be, they are highly improper, and the conduct of the officer consenting thereto or participating therein is highly reprehensible. However, the presumption of prejudice from the transgression in the circumstances of this case was such as to yield quite readily to rebutting proof; and it was most thoroughly rebutted, as it seems to us. The officer in charge of the jury frankly related all the circumstances connected with the transaction, showing that Cornelius made no effort to talk with the jury; that his conversation was wholly with such officer except that he said good morning to the jurors; that his handing the money to the

officer to buy cigars for the jurors was a mere friendly act, such as he was accustomed to do, and that such officer asked the trial judge whether he should give the cigars to the jury or not. The circumstance as explained was of trifling character,—certainly not one that would warrant disturbing the verdict of a jury under the rules laid down in the opinions of this court. *Hempton v. State,* 111 Wis. 127, 86 N. W. 596. The conduct of Cornelius and the officer presents none of the elements of gross misconduct sometimes severely criticized by appellate courts and sometimes held fatal to the verdict.

We have now considered one by one all the propositions presented by counsel for plaintiff in error, and endeavored to respond fully to his appeal for a careful, critical and thorough examination of the case to the end that if the accused has not had a fair trial he might be relieved from the judgment rendered against him. In our judgment there is no error in the record. The trial seems to have been exceptionally clean and fair from beginning to end, and the result must stand so far as judicial relief is concerned.

By the Court.—The judgment is affirmed.

The plaintiff in error moved for a rehearing.

The following opinion was filed February 23, 1904:

MARSHALL, J. A motion for reargument has received careful attention. Because of the importance of the case, and the evident confidence of counsel that a further consideration of one question, not very fully treated in the former opinion, should be had, we have examined the matter with care, and will depart from the usual custom of not filing a second opinion upon coming to the conclusion that the judgment entered should stand.

The question above referred to is this: Does the destruction of human life by an act of another naturally and ac-

cording to the ordinary course of things calculated to effect that result, in the absence of any explanatory circumstances to the contrary, raise a presumption of fact or of law that the destroyer intendeded such result and is guilty of murder in the first degree? Respecting counsel's argument in support of the negative, in the former opinion we said:

"Counsel for plaintiff in error freely admits that the law is as thus stated as applied to murder at the common law, but insists that the law is different under our statutory system. No very good reason is advanced to support that idea, and no authority in support thereof is cited."

Counsel takes issue with that because he cited, before, *Stokes v. People,* 53 N. Y. 164, 179. This seems to be a fair, if not a sufficient answer thereto: The quoted language was not used without qualification or explanation. It was said that counsel produced no very good reason or authority for his position, since our statutes, as construed, make every intentional destruction of human life, not excusable or justifiable, murder in the first degree; and the departure from the common-law rule, as to the presumption arising from an unexplained homicide, where such departure prevails, grows out of statutory differences rendering such intentional killing a homicidal offense, either in the first or some lower degree according to the facts. *Stokes v. People* was not deemed important, since mere actual intent to kill was not, under the New York statutes when Stokes' offense was committed, in any circumstances, necessarily, murder in the first degree. We referred to one of many cases that might have been cited, showing that the rule contended for found a place in the books by reason of features of many statutes not in ours. Here, actual intent to slay satisfies the premeditated design of the statute (*Hogan v. State,* 36 Wis. 226; *Perugi v. State,* 104 Wis. 230, 80 N. W. 593), and is inconsistent with any other homicidal offense. That has been so distinctly and firmly entrenched in our jurisprudence that it was supposed

authorities to the contrary elsewhere, under different statutes, might properly be referred to as not in point. Counsel now cites quite a number of adjudications, not taking note of our suggestion that decisions under statutes radically different from ours cannot be followed, further than to say that some of such authorities are based on statutes like ours. Though decisions of the character cited exist in abundance, we venture to say that without any important exception the variance therein, from the doctrine that the unexplained taking of human life by means ordinarily and naturally calculated to produce that result implies a homicide committed with actual intent, satisfying the element of premeditated design of our statute, is attributable, reasonably or necessarily—the latter in most cases—to plain statutory differences. To refer in detail to the decisions at hand illustrating that, in connection with the statutes involved, would take much time and space. We will refer to a goodly number of them, however, pointing out the significant features of such statutes.

The first statutory system for punishing criminal homicide in this country was adopted in Pennsylvania in 1794. 1 Pepper & Lewis' Dig. of Laws, 1274. "Willful, deliberate and premeditated murder, and murder committed in the perpetration or attempt to perpetrate" certain other specified offenses, were made murder in the first degree, and all other, murder in the second degree. It was early construed as rendering mere intent to kill not inconsistent with murder in the second degree, and as requiring, in order to raise the grade necessarily to the higher degree, the independent elements of deliberation and premeditation upon the execution of the intent, the element of intent being referrable only to willfulness. *Keenan v. Comm.* 44 Pa. St. 55; *Small v. Comm.* 91 Pa. St. 304; *Comm. v. Drum,* 58 Pa. St. 9. The latter case will be found cited very often. It is to this effect: Mere felonious intent to kill is not sufficient to constitute

murder in the first degree, not having the element of fully formed design, involving premeditation and deliberation. It may be murder in the second degree, but to raise it to that phase of murder in the first degree requiring the element of actual intent to kill there must be willfulness, signifying intent, and the other elements in addition; hence the mere unexplained destruction of human life raises only the presumption of murder in the second degree. That gives full effect to the universal rule that every sane person is presumed to intend the natural and probable results of his acts. Such effect being death, the intent to produce death is presumed, but not that the act producing it was characterized by the other elements mentioned. Virginia, West Virginia, Tennessee, Missouri, Michigan, Nevada, Colorado, Nebraska, California, North Carolina, Texas, Iowa, Washington, North Dakota, Massachusetts, Montana, Maine, New Jersey, New Hampshire, and many other states, including by far the greater part of the states of this Union, have similar statutes. They are all based on the Pennsylvania model. Many decisions under them, and text-book authorities, might be referred to supporting the idea that the presumption under consideration does not necessarily go higher than murder in the second degree; but a careful examination of the cases will show a uniform distinction made therein between mere intent to kill before the fatal act, and that full intent required by the statute, the term "deliberate" being used in addition to the term "premeditated design." The usual language is: "When perpetrated from a deliberate and premeditated design," etc. For examples we refer to *State v. Fuller,* 114 N. C. 885, 19 S. E. 797; *State v. Carver,* 22 Oreg. 602, 30 Pac. 315; *McCoy v. State,* 25 Tex. 33; *Floyd v. State,* 59 Tenn. 342; *People v. Wolf,* 95 Mich. 625, 55 N. W. 357; *Stokes v. People,* 53 N. Y. 164; *McCue v. Comm.* 78 Pa. St. 185; *Comm. v. Drum,* 58 Pa. St. 9; *Dukes v. State,* 14 Fla. 499; *State v. Payne,* 10 Wash. 545, 39 Pac.

157; *State v. Foster,* 61 Mo. 549; *State v. Hobbs,* 37 W. Va. 812, 17 S. E. 380; *State v. McCormick,* 27 Iowa, 402; *Schlencker v. State,* 9 Neb. 300, 2 N. W. 710; *Simpson v. State,* 56 Ark. 8, 19 S. W. 99; *Williams v. State,* 83 Ala. 16, 3 South. 616; *Hill v. Comm.* 2 Grat. (Va.) 594; *Howell v. Comm.* 26 Grat. 995. The law as declared therein is laid down without proper or any notice of exceptions in the following works: Desty, Cr. Law, § 129*g;* 21 Am. & Eng. Ency. of Law (2d ed.) 163; 2 Thompson, Trials, § 2208; 1 Wharton, Cr. Law, § 392; 1 McClain, Cr. Law, § 355. The following examples of what is in effect said in such decisions will clearly indicate the significance of the statutory feature we have referred to.

Where an intention to kill exists, it is willful; whilst intention is of the essence of the offense, something more is required for murder in the first degree. There must be circumstances warranting the jury in finding deliberation and premeditation. The unexplained destruction of human life raises the presumption of intent to kill, but that only points to murder in the second degree, because the other constituent elements of willful killing essential to murder in the first degree, deliberation and premeditation, do not arise by presumption. *State v. Foster, supra* (Missouri). The similarity of this to the views expressed in *Comm. v. Drum* will be noted.

Mere unjustifiable, inexcusable intention to kill is not enough to constitute felonious homicide above murder in the second degree. The higher degree requires premeditated intent, which does not arise from unexplained destruction of human life. *Simpson v. State, supra* (Arkansas). The cases are all to the same general effect.

A statutory system was adopted in New York in 1829. Felonious homicides were by it divided into murder and manslaughter. Murder was divided into three distinct classes as to circumstances, but they were all subclasses of the one

offense of murder, no degrees being established. This state antedated New York in that regard by thirteen years. The original New York statute is as follows:

"The killing of a human being, without authority of law, . . . in any . . . manner, unless . . . manslaughter or excusable or justifiable homicide, shall be murder in the following cases:

"1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being:

"2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual:

"3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony." 2 R. S. N. Y. 1829 (1st ed.), p. 656, pt. 4, c. 1, tit. 1, §§ 4, 5.

By ch. 197, Laws of N. Y. 1862, the offense of murder was divided into three degrees, corresponding to the existing classes of murder. By ch. 644, Laws of 1873, a further change was made, the statute assuming this form as to homicide in the first degree:

"When perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being; or when perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or when perpetrated without any design to effect death by a person engaged in the commission of any felony."

And as to the second degree it took this form:

"Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide . . . shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation." 3 R. S. N. Y. 1875 (6th ed.), p. 928, pt. 4, c. 1, tit. 1, § 5.

As first adopted the system was said to make all felonious homicide, characterized by intent to take human life, mur-

der, but as neither making such intent essential to nor excluding it from the second phase of the offense. *People v. Austin,* 1 Parker, Cr. R. 166; *People v. Clark,* 7 N. Y. 385; particularly *Darry v. People,* 10 N. Y. 120. After the first change, *Stokes v. People,* 53 N. Y. 164, was decided, and, consistent with the rule established as to murder in the second degree, the language was used upon which counsel relies. The court leaned toward the holdings under the Pennsylvania statute. After the second change adding the element of deliberation to that of premeditated design in murder in the first degree, and the element of intent to kill, but without premeditation and deliberation, to murder in the second degree, the doctrine, that circumstances raising the presumption of intent to kill satisfy only the calls for the essentials of the latter degree, necessarily prevailed. *People v. Beckwith,* 103 N. Y. 360, 8 N. E. 662; *People v. Hawkins,* 109 N. Y. 408, 17 N. E. 371; *People v. Conroy,* 97 N. Y. 62.

The state of Florida adopted the New York system as it existed after the change of 1862, with its judicial construction of the language of murder in the second degree. That explains why *Dukes v. State,* 14 Fla. 499, now cited by counsel, does not have the force counsel claims for it.

The Minnesota system, as it existed up to its revision of 1878, was copied from ours, with some changes which we will mention. Actual intent to kill, coupled with heat of passion, was made an element in one degree of manslaughter. The language as to murder in the first degree was a verbatim copy of ours. That of the second degree differed from ours in this: For the words here, "dangerous to others . . . although without any premeditated design to effect the death of any particular individual" (sec. 2, R. S. 1849, p. 682, ch. 133; R. S. 1858, p. 928, ch. 164), were these words: "Dangerous to one or more persons . . . without any design to effect death." That was changed before the Minnesota revision of 1891 by making the second degree the

third and making killing with design to effect the death of the person killed or of any other, but without deliberation and premeditation, murder in the second degree. Cr. Code Minn. 1866 (Revision 1866, p. 597, ch. 94, § 2); 2 Gen. Stats. Minn. 1891, p. 488. Before the change referred to the court said, respecting the presumption under consideration:

"It is presumed that every sane person intends the ordinary and natural consequences of his own deliberate act, and that every voluntary act springs from deliberate volition, and not blind passion; and as every act unlawful in itself is presumed to have been wrongfully intended till the contrary appears, it follows that such a killing, unaccompanied by any circumstances of extenuation or explanation, necessarily raises the presumption that it was intentionally and maliciously done; and unless it appears that such intention was formed and executed under the influence of 'a heat of passion produced by a sudden provocation, or in sudden combat,' it is equivalent in import and meaning to a premeditated design, as that phrase is used in the statutes." *State v. Lautenschlager,* 22 Minn. 514.

After the change that was adhered to because the essentials of murder in the first degree were as before, the views of the court being expressed thus:

"The offense may be found to be of this grade (murder in the first degree) from the mere fact and circumstances of the killing; and where there are no circumstances to prevent or rebut the presumption the law will presume that the unlawful act was intentional and malicious, and was prompted and determined on by the ordinary and natural operations of the mind." *State v. Brown,* 41 Minn. 319, 43 N. W. 69.

That was affirmed in *State v. Lentz,* 45 Minn. 177, 47 N. W. 720, in this language:

"Murder in the first degree may be proved by the mere fact of an intentional killing. . . . The evidence contained no suggestion of any provocation or mitigating circumstances, or that the killing was accidental, the testimony

of the defendant himself excluding any such hypotheses. The killing, if committed by defendant, was murder in the first degree."

This court rejected the New York construction of the language of our murder in the second degree in *Darry v. People,* 10 N. Y. 120, holding that the legislative plan here was to make every inexcusable, unjustifiable homicide, intentionally effected, murder in the first degree, to make the element of intent to kill an essential of that and to exclude it from all other degrees of felonious homicide; and to that end that the terms "design" and "premeditated design" were used synonymously and as meaning only actual intent. *Hogan v. State,* 36 Wis. 226. The court was free to and did place its own construction on the statute, the language thereof not having received construction in New York before its adoption here, further than to the effect that every homicidal offense characterized by intent to kill is murder, not manslaughter, which was adopted. That is, as seems plain, in harmony with constructions of statutes elsewhere, except in the instance referred to, and such as are explained by radical difference in language. At this time there is no conflict between this court and that of New York, because the statute there has been changed, as we have seen, to make the literal sense thereof conform to the judicial construction; and our statute has been likewise changed. The revisers of 1878 changed the language of murder in the second degree, "without any premeditated design to effect the death of the person killed or of any particular individual," to "without any premeditated design to effect the death of the person killed or of any human being." That change was made to make the statute conform in literal sense to *Hogan v. State,* 36 Wis. 226. See Revisers' Notes, 1878, p. 297.

From the foregoing it follows that all the decisions and remarks of text writers to the general effect that the presumption under discussion points only to murder in the sec-

ond degree, instead of supporting the idea that it should be so restricted under our statutes, conclusively indicates to the contrary, since the element of intent to kill here is consistent only with murder in the first degree, and such element being present no additional element of deliberation is necessary, all the deliberation essential being involved in the actual formation of the purpose to kill before the perpetration of the fatal act. The formed design or intent of our premeditated design need not exist any appreciable time or time sufficient for the intervention of any independent element between it and the fatal act, it being sufficient if it actually precedes such act. Intent to kill means just what the ordinary signification of the words suggest. Whether it be described by the words "actual intent," "design," or "premeditated design," makes no difference. When we leave entirely out of view those subtleties often indulged in in discoursing on the meaning of "premeditated design," or "deliberate and premeditated design," and give to the words only the meaning ordinarily attributed to them in the common use thereof, a person who effects the death of another by design does so intentionally and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated, or thought of, because without mental action the purpose could not be formed. So when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design and by premeditated design. That the word "premeditated," as used in our statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design," where used inclusively in murder in the first degree, as to "design" where that word alone is used exclusively in murder in the third degree and manslaughter in the first,

more intense malice, the verdict can be only for the second degree. But it should be borne in mind that the circumstances and statutes differ, and that the jury should pass on the question."

No case is referred to by the author, except those under statutes differing from ours, requiring something more in murder in the first degree than mere intent to kill, yet he concludes that a presumption of fact arising from the unexplained use of a deadly weapon in a way ordinarily calculated to produce death, and which does produce it, arises, of such strength to warrant a jury, if they see fit, in finding murder in the first degree. That is really as far as it was necessary to go in this case, and as far as the court in fact went; though it seems that, since under our statute actual intent to kill, executed, without any other element, there being no circumstance reducing the offense below that of the highest, constitutes murder in the first degree, the presumption of law, that every person intends the natural and ordinary consequences of his voluntary acts, must, when the act causes the death of a human being, include the presumption that the perpetrator thereof intended that result and is guilty of murder in the first degree, casting upon him the burden of producing evidence to at least involve the truth of the matter in reasonable doubt. This court said in the *Clifford Case,* where a conviction was had of murder in the first degree, that the expression in the trial court's instructions, "It is presumed that a reasonable person intends all the natural, probable and usual consequences of his act," is strictly correct in all moral action or human affairs, and is an axiom of the law; and that the expression, "If a reasonable man uses a deadly weapon and life is taken, he is presumed to intend the natural consequences of his act and would be guilty of murder,"—"is but an application of the principle of homicide with a dangerous weapon likely to kill." "If a weapon likely to kill, and which did kill, was used, the intent

is presumed that such a natural and reasonable consequence would follow the assault, and nothing less." True, in connection with that, language was used of the character heretofore referred to, but, as we have seen, so far as it suggested that there may be an intent, a mental purpose to take human life, in some other homicidal offense than the first, such idea has been repudiated. What was said in respect to the presumption under discussion, therefore, stands as an authoritative declaration to the same effect as that contained in the opinion in this case, which counsel thinks is prejudicially wrong to plaintiff in error.

The result of a full response to counsel's appeal for a reconsideration of the question above discussed is that the conclusion in respect thereto, embodied in the judgment rendered, is correct. Therefore the motion for a rehearing must be denied.

By the Court.—So ordered.

MITCHELL IRON & LAND COMPANY, Respondent, vs. FLAMBEAU LAND COMPANY and others, Appellants.

February 2—February 23, 1904.

Quieting title: Pleading: Sufficiency of allegation: Demurrer: Anticipated defenses.

1. Under the provisions of sec. 3186, Stats. 1898, that it shall be sufficient in actions to quiet title to real estate to aver in the complaint the nature and extent of plaintiff's estate in such land, describing it as accurately as may be, that he is in possession thereof, or that the land is vacant and unoccupied, and that the defendant makes some claim thereto—a complaint alleging, in substance, that plaintiff is the owner in fee simple of the lands described, and that defendant makes claims thereto which are clouds upon that title, satisfies the calls of the statute, and is not open to the criticism that its allegations constitute mere conclusions of law.

2. In such case, however, if the complaint in addition to the allegations called for by the statute, proceeds to allege other facts as to defendant's title, which from want of further allegation, are not shown to be invalid or ineffectual, the complaint shows affirmatively that plaintiff has no cause of action and is demurrable.
3. Under sec. 1176, Stats. 1898 (providing that a tax deed executed and acknowledged as required by law shall vest in the grantee an absolute estate in fee simple; and that such deed shall be presumptive evidence of the regularity of all prior proceedings), a complaint in an action to quiet title, which, after formal allegations sufficient to satisfy the calls of sec. 3186, Stats. 1898, alleges that defendants have received from the county clerk certain tax deeds, but makes no assertion as to their invalidity, must be read as asserting that the instruments, under which defendants claim, were executed, and contain the declarations and recitals required by law, which establish *prima facie* the regularity of all proceedings, conveying absolute title, and hence that the complaint shows upon its face that plaintiff is not entitled to the relief demanded.
4. In such case, an assertion in the complaint that the tax deeds are clouds upon plaintiffs' title, is *held* not inconsistent with their entire validity.

APPEAL from an order of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Appeal from order overruling a general demurrer to the complaint. That pleading alleges first that the plaintiff owns in fee simple, through mesne conveyances from the government, certain real estate; that the defendants make some claim thereto, to wit, that the defendant *Flambeau Land Company* has received from the county clerk certain tax deeds, and has caused the same to be recorded in the register's office, to wit, one dated and recorded in May, 1899, and others dated in May, 1901, and that it claims under other alleged tax deeds; also that the *Chippewa Farm Land Company* claims by a deed from the *Flambeau Land Company,* and that the latter also claims under a mortgage from the former; and that the defendant *Bailey* claims by virtue of certain tax certificates for the year 1899; that the claims of

said defendants constitute and are clouds upon the title of the plaintiff. Judgment is demanded establishing plaintiff's title against the claim of any or all of the defendants; that they be barred from having any claim or right to the lands, and they be adjudged to release to plaintiff all their claims to the land.

D. Buchanan, Jr., for the appellants.

T. H. Bushnell, for the respondent.

DODGE, J. Appellants' first criticism of the complaint is that the general allegations that plaintiff is the owner in fee simple of the lands described, and that defendants make claims thereto which are clouds upon that title, constitute mere conclusions of law, and are not allegations of any facts, within the requirements of sec. 2646, Stats. 1898. That suggestion has support from some earlier cases. *Wals v. Grosvenor,* 31 Wis. 681; *Page v. Kennan,* 38 Wis. 320. Its efficiency is, however, wholly overcome by the statutory amendment now embodied in sec. 3186, Stats. 1898, which declares:

"It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, that he is in possession thereof or that said land is vacant and unoccupied, and that the defendant makes some claim thereto."

The allegations criticised, if they stood alone, would satisfy the calls of this statute, and be sufficient. The more serious difficulty is that plaintiff, while doubtless alleging all that the statute requires, has not been content to stop there, but has proceeded to allege other facts, which, it is claimed, show affirmatively that it has no cause of action. If this be so, of course, the demurrer should have been sustained. It would be absurd to put a defendant to the trouble of answering, and the court to the burden of hearing, a case, when, upon the showing of the complaint, no judgment save dismissal thereof can be rendered. Such possibility is repudi-

ated by all the authorities. *Teetshorn v. Hull,* 30 Wis. 162; *Kellam v. Toms,* 38 Wis. 592, 602; *Lawrence v. Janesville,* 46 Wis. 364, 1 N. W. 338, 50 N. W. 1102; *Hoth v. Peters,* 55 Wis. 405, 412, 13 N. W. 219; *State v. Egerer,* 55 Wis. 529, 13 N. W. 461; *Crumbly v. Bardon,* 70 Wis. 385, 39 N. W. 19; *State v. Citizens' Ins. Co.* 71 Wis. 411, 37 N. W. 348. While a complaint need not negative defenses, it will be demurrable if it assert facts showing a complete and valid one to exist.

The allegations relied on to thus show an affirmative defense are that defendants have received from the county clerk certain tax deeds and certain tax certificates. Are such allegations so effective? If such deeds are valid, they certainly do cut off all plaintiff's government title, and confer title on defendants, which plaintiff cannot have barred or released. Sec. 1176, Stats. 1898, provides that a tax deed executed and acknowledged as required by law shall vest in the grantee absolute estate in fee simple; also that it shall be presumptive evidence of the regularity of all the prior proceedings. See, also, *Gates v. Parmly,* 93 Wis. 294, 312, 66 N. W. 253, 67 N. W. 739. The complaint makes no assertion whatever as to the terms or validity of the conveyances received by defendants, except that they were "tax deeds." To be such, they must have been more than blank paper. The county clerk has no authority to deliver them until they have been executed in the name of the state and of his county, under his hand and the seal of the county, and acknowledged by him. How, then, can we escape the conclusion that they are not tax deeds, until so executed, containing the declarations and recitals required by law? It seems to us that we cannot, but that we must read this complaint as asserting that the instruments under which the defendants claim were so executed. As a result, of course, they establish *prima facie* the regularity of all prior proceedings, and convey absolute title. If they are claimed by plaintiff

to be in any way invalid or ineffectual, nothing was easier than for him to so declare, but he has industriously refrained from so doing. The assertion that they are clouds upon his government title is not inconsistent with their entire validity. Being valid, they are only so much more effective as clouds that they obscure and blot out entirely the former title. We come to the conclusion, therefore, that the complaint shows upon its face that plaintiff is not entitled to the relief demanded against the defendants.

By the Court.—Order appealed from is reversed, and cause remanded with directions to sustain the demurrer.

CITY OF ASHLAND, Appellant, vs. WHITCOMB and another, Receivers, Respondents.

February 2—February 23, 1904.

Federal courts: Jurisdiction of causes removed from state court: Powers and duties of state court.

1. Where, in an action against receivers of a railroad, appointed by a federal court, to compel the removal of obstructions from certain streets the title to which was claimed by defendants, the action had been removed to the federal court, and the federal court had assumed jurisdiction and retained the same after a motion to remand to the state court, the state court can properly take no proceedings in the action while the cause is still proceeding in the federal court.
2. In such case, the ultimate authority to decide finally and conclusively upon the question of jurisdiction is in the federal court, and the state court will respect its determination in any case covered by the federal removal statute.

APPEAL from a judgment of the circuit court for Ashland county: A. J. VINJE, Judge. *Affirmed.*

This is an equitable action commenced by the appellant, the city of *Ashland,* to compel respondents to remove ob-

structions from a street of the city, and to restrain them from continuing the obstructions. This case, as well as the companion case, *Ashland v. Wis. Cent. R. Co.* 98 N. W. 532, which are submitted and argued together on this appeal, were before this court on an appeal from orders like the ones from which these appeals are taken, and are reported, with a full statement of facts, which need not be repeated, in 114 Wis. 99, 89 N. W. 886, and 114 Wis. 104, 89 N. W. 904, respectively. In addition to the facts there stated, it now is without dispute that the United States circuit court for the western district of Wisconsin has assumed jurisdiction of the action; that the action was, on motion in open court, duly docketed in that court, over the objection of appellant; that the United States circuit court on December 28, 1897, denied appellant's motion to remand the case to the state court, and retained jurisdiction of the case. Appellant thereafter filed its bill in equity, as required by the practice in the federal courts, and subsequently amended the bill; praying for the same relief asked for in its complaint in the state court. Respondents, the receivers of the railway company, on the 25th day of August, 1900, brought a cross-bill in the action then pending in the federal court, setting up that, by ordinances of the common council of appellant, and acts pursuant thereto, the title to the portion of Fourth Avenue West, and also Fourth street and Second and Third Avenues West, then in their possession, had vested in them, and prayed it be declared to be vested in them, and that the appellant city be forever enjoined from interfering or attempting to interfere with the right, title, or possession of the receivers as to such streets. Appellant appeared and interposed a demurrer to this cross-bill. The issue thus raised has not been determined by the federal court. Appellant noticed the case for trial at the September, 1902, term of the Ashland county circuit court, where respondents had appeared specially and moved to strike the cause from the calendar. This motion was

granted, upon the fact that the federal court had assumed jurisdiction and retained the cause as properly pending before that court, where appellant had appeared and submitted to proceedings had in the cause. From this order the city appeals.

For the appellant there was a brief by *F. J. Colignon,* attorney, and *Dillon & Colignon* and *W. M. Tomkins,* of counsel, and oral argument by *Mr. Tomkins.*

For the respondents there was a brief by *Howard Morris* and *Thomas H. Gill,* of counsel, and oral argument by *Mr. Gill.*

SIEBECKER, J. The questions raised upon this appeal were presented to this court on a former appeal, April 1, 1902. 114 Wis. 99, 89 N. W. 886. The jurisdictional question involved was not determined, because not properly before the court upon the record as it then stood. It was therein decided that the order striking a case from the calendar upon the ground that it appeared that the action is pending before a federal court, and that the state court has no jurisdiction, is a determination that the trial of the case cannot be prosecuted to judgment in the state court. The order was held appealable, because it affects a substantial right, and does, in effect, determine the action, and prevent a judgment from which an appeal might be taken. From the statement of facts, it now appears that the United States circuit court for the western district of Wisconsin has assumed and retains jurisdiction of this cause, and that the action is now pending in that court. It is undisputed in this case that respondents were receivers of the railway, and had possession of its property, before this action was commenced, upon an order or decree in a proceeding of the federal court. By this proceeding the federal court assumed administration of the railway company's property and held possession and control through the receivers, as its officers, for the purpose of applying it

to the benefit of persons whom it may adjudge entitled thereto. Respondents are sued in their capacity as receivers, and the right to the possession of the railway company property is involved in the issues of the case. Under these circumstances, the federal court has determined and assumed jurisdiction of the subject-matter of the action, involving the possession of this property. That the state courts will respect its determination under such circumstances is clearly established and fully recognized in *Northern Pacific R. Co. v. McMullen,* 86 Wis. 501, 56 N. W. 629, and *State ex rel. Atty. Gen. v. Frost,* 113 Wis. 623, 88 N. W. 912, 89 N. W. 915. In the last case, upon an exhaustive review of the adjudications, Mr. Justice DODGE states the rule to be:

"The ultimate authority to decide finally and conclusively upon the jurisdiction of a federal court, or upon the validity of one of its decrees or of a federal statute, is in the federal courts, and the consideration of such validity must be yielded up by the state courts in any case covered by the federal removal statutes."

Since the federal court has assumed jurisdiction of the action, and the cause is still pending there, the circuit court of Ashland county properly held that no proceedings could be taken therein.

By the Court.—The order is affirmed.

HART and wife, Respondents, vs. JOS. SCHLITZ BREWING COMPANY, imp., Appellant.

February 2—February 23, 1904.

Appeal and error: Respondent's exceptions, when available: Filing of records: Mortgages: Foreclosure: Judgment, when entered: Modification: Effect.

1. A respondent may avail himself of his exceptions to findings to sustain the judgment appealed from.
2. In an action to set aside a foreclosure sale, it appeared that the judgment on default was signed by the trial court, and the costs taxed and inserted therein January 14, 1896; that the judgment roll with the costs so taxed inserted, was, on that day, handed to the clerk, who retained them in his office until October 25, 1897, at which date the clerk indorsed such judgment as filed, and entered the same of record. *Held*, that the mere improper failure of the clerk to mark the papers as filed on January 14, did not prevent the actual filing at that date from being effectual.
3. In an action to set aside a foreclosure sale it appeared, among other things, that the judgment on default was entered January 14, 1896; that on October 13, 1897, on the plaintiff's application, an order was entered reducing the amount of solicitors fees from $100 to $50, so as to conform to the findings as originally drawn; that the sale thereunder was had April 8, 1898, and that the mortgagors took no steps to set aside the sale until December 5, 1900. *Held*, that such alteration of the judgment did not make a new judgment, nor extend the time for redeeming from the judgment which had originally been entered.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

It appears from the record, and is in effect found by the court, that September 10, 1894, the plaintiffs, *Michael J.* and *Bridget Hart,* executed and delivered to the *Jos. Schlitz Brewing Company* their promissory note for $500, due in one year from that date, with interest at six per cent.; that at the same time the plaintiffs executed and delivered to that company a mortgage to secure the payment of that note on

land described belonging to the plaintiff *Michael J.*, and at the same time they executed and delivered to that company another mortgage to secure the payment of the same note on land described belonging to the plaintiff *Bridget;* that each of said mortgages contained a stipulation for the payment of $50 solicitor's fees in case of the foreclosure of the mortgage; that in November, 1895, the brewing company commenced an action for the foreclosure of both mortgages against *Michael J.* and *Bridget Hart;* that both made default, and neither appeared in the action; that January 14, 1896, judgment of foreclosure and sale was procured in the court, and signed by the judge thereof, wherein it was adjudged that there was due to the brewing company, for principal and interest, $540, and costs therein specified, in a bill taxed and signed by the clerk and thereto attached, aggregating $82.58, and also $100 solicitor's fees inserted in the judgment, making in all $722.58; that such signature in the judgment roll and papers upon which the same was founded, with the costs so taxed inserted, was procured by the attorney of the brewing company January 14, 1896, and handed to the clerk of the court for entry and record, and the judge, at the time of signing such judgment, minuted the rendition thereof in his minutes; that on and before September 14, 1896, said *Michael J.* had knowledge of the entry of said judgment of foreclosure and sale; that October 13, 1897, an order was entered in said court reducing the amount of solicitor's fees from $100 to $50, and amending the judgment accordingly, so that the total amount of the judgment, January 14, 1896, was thereby reduced to $672.58; that the clerk of the court retained the judgment roll and papers in his office from January 14, 1896, to October 25, 1897, without indorsing the same as filed; that on said last-mentioned date the clerk indorsed said judgment as filed, and entered the same of record; that, pursuant to due notice given, all of the property covered by said mortgages was sold in good faith, and with-

out any intent to defraud, in parcels to and bid in by the brewing company under and upon said judgment, April 8, 1898; that upon such sale the sheriff reported a deficiency of $681.01, and the same was confirmed by the court June 3, 1898, and judgment for such deficiency was thereupon rendered for the amount stated against *Michael J.* and *Bridget Hart,* and in favor of the brewing company; that *Michael J.* had knowledge of such sale prior to June 1, 1898; that after he obtained such knowledge the brewing company in good faith contracted to sell such lands to the defendant Rock Le Ville for $650; that the value of the property at the time of the foreclosure sale was $750; that the plaintiffs took no steps to set aside said foreclosure sale until December 5, 1900, when they commenced this action to set aside said judgment of foreclosure and sale so far as it affected the separate property of the plaintiff *Bridget,* and to set aside the sale and the order confirming the same. The brewing company answered the facts set forth above, and, upon trial being had, the court found the facts in effect as stated. As conclusions of law the court found in effect that the plaintiffs were entitled to no relief, except that the foreclosure sale of April 8, 1898, was within one year from the entry of the judgment, and hence premature, and therefore should be set aside. From the judgment entered thereon accordingly, the defendant *Jos. Schlitz Brewing Company* brings this appeal.

For the appellant there was a brief by *R. Sleight,* attorney, and *Miller, Noyes & Miller,* of counsel, and oral argument by *Geo. H. Noyes.*

For the respondents there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

CASSODAY, C. J. The findings of fact are against the plaintiffs, and in favor of the brewing company. The plaintiffs seek to avail themselves of exceptions to certain of such findings to sustain the judgment—a practice which is per-

missible. Sec. 3070, Stats. 1898, and notes. They claim that it appears from the preponderance of the evidence that the judgment of foreclosure and sale was not entered January 14, 1896, nor until it was marked as filed by the clerk October 25, 1897. If that were so, then the sale was premature. The mere improper failure of the clerk to mark the judgment and the papers composing the judgment roll as filed did not prevent such filing from being effectual. *Lang v. Menasha P. Co.* 119 Wis. 1, 96 N. W. 393, and cases there cited. It is conceded that the judgment was signed by the trial judge January 14, 1896, and contained the amount of costs as taxed by the clerk at $82.58. There can be no reasonable doubt but that the judgment so signed, and the papers upon which it was based, were all delivered to the clerk at or about that time. Thereupon the duties of the clerk as to such judgment and judgment roll were prescribed by the statute. Sec. 742, Stats. 1898. The trial court found that the findings in the foreclosure action, as originally drawn, provided for only $50 solicitor's fees, and that the same was erased and $100 inserted in place thereof, but that the evidence failed to show whether such change was before or after the rendition of the judgment, and therefore held that the same was made prior to the rendition of the judgment. Certainly it is not to be presumed that the findings or judgment were corruptly altered, especially as the trial court also found that there was no fraud on the part of the brewing company or its attorney or his clerk in the preparation of said judgment, or in the entry or filing thereof, or in anything done by them or either of them in respect to the same. The order of October 13, 1897, reducing the amount of the solicitor's fees from $100 to $50, was made on the application of the brewing company. If the facts were as contended by the plaintiffs, then such order merely made the judgment conform to the original findings. Did the reduction of the solicitor's fees in the judgment from $100 to $50, October 13,

1897, make it a new judgment within the meaning of the statute? Sec. 3162, Stats. 1898. That section provides that "the judgment shall fix the amount of the mortgage debt then due," and also any installments to become due. It also prohibits any sale "until the expiration of one year from the date of such judgment or order of sale." Id. Another section gives a right to redeem "at any time before the sale." Sec. 3165, Stats. 1898. The manifest purpose of these sections was to give all parties interested one year from the date of the judgment or order of sale within which to redeem. *Citizens L. & T. Co. v. Witte,* 119 Wis. 517, 97 N. W. 161. The language of the statute seems to have been departed from in *Andrews v. Welch,* 47 Wis. 132, 135, 136, 2 N. W. 98. That case was criticised in a later case, wherein it was held:

"If the judgment has been signed and filed with the clerk and the costs have been taxed and inserted therein, it need not be recorded before the year will begin to run." *Meehan v. Bloodgett,* 86 Wis. 511, 57 N. W. 291.

Since that decision it has been held:

"The correction of a mere clerical mistake in a judgment of foreclosure does not make a new judgment. The corrected judgment will stand as effective for all purposes as if properly entered in the first instance." *Bostwick v. Van Vleck,* 106 Wis. 387, 82 N. W. 302. See, also, *Packard v. Kinzie Ave. H. Co.* 105 Wis. 323, 81 N. W. 488.

Here the trial court, on the application of the brewing company, reduced the amount of the solicitor's fees inserted in the judgment to $50, so as to conform to the amount contained in the findings as originally drawn. We must hold that such alteration did not make a new judgment, nor extend the time for redeeming from the judgment which had thus been entered.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

CARPENTER and another, Respondents, vs. CHRISTIANSON and others, imp., Appellants.

February 2—February 23, 1904.

Pleading: Joinder of causes of action.

An action in equity brought by taxpayers for the one general purpose of preserving the public funds from dissipation by public officers, presents but one primary right or subject of controversy for adjudication, although it thereby becomes necessary to bring in numerous parties defendant whose rights may be entirely distinct as between themselves.

DODGE, J., dissents.

APPEALS from an order of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

W. F. Bailey, for the appellants, contended that the only authority for joining separate causes of action must be found, if at all, in the statutes. *Leidersdorf v. Second Ward Sav. Bank,* 50 Wis. 406, 411; *Hoffman v. Wheelock,* 62 Wis. 434, 440; *John R. Davis L. Co. v. Home Ins. Co.* 95 Wis. 542, 547; *Turner v. Duchman,* 23 Wis. 500; *Atchison, T. & St. F. R. Co. v. Sumner Co.* 51 Kan. 617; *Johnson v. Kirby,* 65 Cal. 482; *Addicken v. Schrubbe,* 45 Iowa, 315; *Greene v. Nunnemacher,* 36 Wis. 50; *Blakely v. Smock,* 96 Wis. 611; *Plankinton v. Hildebrand,* 89 Wis. 209; *Draper v. Brown* 115 Wis. 361.

For the respondents there was a brief by *Frawley, Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

WINSLOW, J. This is an action in equity, brought by two taxpayers of Sawyer county on behalf of all the taxpayers of the county, to prevent the payment by the county treasurer of a large number of county orders alleged to be fraudulent and void, also to prevent the said treasurer from paying certain fraudulent judgments secured against the county collusively, and to enjoin their collection perpetually, and to

compel the payment into the county treasury of moneys claimed to have been unlawfully received therefrom by certain of the defendants. Sawyer county is made a defendant, as well as its present county treasurer and members of its board of supervisors who, it is charged, participated in the allowance of the alleged illegal claims, and are hostile to the bringing of this action, so that the rights of the county will not be protected unless it can be done in this action. In addition to these parties, a considerable number of persons are made defendants who are alleged to have received the various fraudulent county orders or to own the fraudulent judgments, as well as a former county treasurer whose official account is alleged to have been fraudulently allowed by the defendant supervisors. A number of these last-named defendants, including the ex-treasurer, demurred separately to the complaint on the ground that a number of causes of action had been improperly joined, and, their demurrers having been overruled, they have separately appealed.

The appellants' argument is that the allegations of the complaint as to each separate fraudulent county order constitute a separate cause of action not affecting the holder of another order, hence that there must be a separate action brought as to each order, because the various causes of action do not arise out of the same transaction or transactions connected with the same subject of action. Sec. 2647, Stats. 1898. This contention cannot be sustained. The action is one in equity brought by taxpayers because the county officials are involved in the alleged frauds and will not bring an action in the name of the county itself. It is brought for one general purpose, namely, to prevent the dissipation of the public funds of the county by a general raid thereon. The rule in equity is that a complaint is not multifarious if it presents but one primary right or subject of controversy for adjudication. If it meet this test it presents but one cause of action, and all merely incidental rights connected

with this primary right may be enforced in the same action, though it thereby becomes necessary to bring in numerous parties defendant whose rights may be entirely distinct as between themselves. *Bassett v. Warner,* 23 Wis. 673; *Adkins v. Loucks,* 107 Wis. 594, 83 N. W. 934; *Level Land Co. v. Sivyer,* 112 Wis. 442, 88 N. W. 317. This well-known principle disposes of the case. The action is brought, as before stated, to preserve the public funds from dissipation by public officers. These officers are made defendants, and are charged with having issued fraudulent and illegal county orders, colluded in the rendering of fraudulent judgments against the county, and defrauded the county by fraudulently auditing a false account against the county by an outgoing county treasurer. The primary right sought to be enforced is the conserving of the public funds. To this primary right all the other claims in the complaint stated, including even the recovery back of amounts illegally paid out to the former treasurer, are purely incidental, and hence may be enforced in one action. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460.

By the Court.—Order affirmed upon each appeal.

DODGE, J. I entertain no serious doubt of the propriety, in an action against the county and its officials to prevent the dissipation of public funds by payment thereof upon unlawful claims, of joining the claimants. Finality of adjudication that their claims are unlawful can be had only by their presence, and such finality, as against them, is entirely incidental to the desired decree forbidding payment to them. Such an action is in the right of the taxpayer, a member of the corporation, to prevent illegal corporate action. I cannot, however, convince myself of the propriety of joining therewith a demand that the county recover back from the ex-treasurer, *John Erickson,* money that he has unlawfully received. That is a cause of action in favor of the

county, which, it is true, a member of such corporation, a taxpayer, may move when the constituted authorities refuse. *Jenkins v. Bradley,* 104 Wis. 540, 80 N. W. 1025; *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69, 74. Such an action is in no wise incidental to that which my brethren deem the dominant and pervading cause of action sought to be stated, in which, it seems to me, *John Erickson* has no possible interest. The joinder of the two seems to me forbidden by *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, and *Luther v. C. J. Luther Co. supra,* and cases there cited.

ANDRESEN, Respondent, vs. UPHAM MANUFACTURING COMPANY, Appellant.

February 2—February 23, 1904.

Contracts: Quantum valebat: *Pleadings: Sufficiency: Evidence: Delivery to third person: Findings: Costs.*

1. In an action to recover a balance alleged to be due for goods sold and delivered to defendant at its request, a complaint framed after the form of common counts is sufficient to warrant admission of evidence that the goods were delivered to a third person on account of defendant.
2. In an action on implied contract for goods delivered to a third person at defendant's request, a general finding, following the allegations of the complaint, that the sale and delivery was to defendant, necessarily involves a promise, express or implied, upon the part of defendant to pay for the property.
3. It having been conceded on the trial that a certain class of items should be deducted from the claim set forth in the complaint, and the judgment having included such items by mistake, on an appeal taken without having called respondent's attention to such items, and given him opportunity to correct the error, appellant cannot recover costs in the supreme court, although the judgment be reduced to the proper amount by that court.

4. In an action for the value of goods alleged to have been delivered to a third person at defendant's request, the evidence examined, and a finding, that defendant was the purchaser of the goods delivered by plaintiff, is *held* to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Taylor county: LAWRENCE W. HALSEY, Judge. *Reversed.*

Action to recover a balance claimed to be due for goods, wares and merchandise sold and delivered to the defendant at its request. The reasonable value of the goods so sold and delivered was alleged to be $572.30, the amount paid $14.60, and the balance due $557.70, for which latter sum, with interest from October 11, 1899, judgment was demanded. Defendant, for an answer, pleaded a general denial.

The case was duly sent to a referee to hear, try and determine. Upon the hearing plaintiff, under objection, introduced evidence showing or tending to show that one A. R. Gates, while performing a logging and tie contract with defendant, was authorized by its agent, one W. G. Hinman, duly empowered in the matter, to purchase goods of plaintiff on its account, and that pursuant thereto the goods referred to in the complaint, less $2, were at the request of said Gates delivered either to him or to others upon his order; that no part thereof came to the actual possession of defendant; that except for $14.60 in value, of goods returned, no payment has been made to plaintiff; and that the balance of $555.70 became due and payable October 11, 1899. The referee found accordingly. The findings were confirmed by the court. Judgment was rendered pursuant thereto, and defendant appealed.

For the appellant there was a brief by *Schweppe & Urquhart,* and oral argument by *E. H. Schweppe.*

For the respondent there was a brief by *A. W. Sanborn,* attorney, and *Allan T. Pray,* of counsel, and oral argument by *Mr. Pray.*

MARSHALL, J. Appellant contends that the complaint, which was framed after the form of common counts, was insufficient to cover the element of delivery of goods to Gates on account of appellant, and that all evidence to establish the cause of action, so far as it depended on such element, was improperly received. Such contention is based on *Smith v. Leland,* 2 Duer, 497, and authorities depending thereon. That case was decided in New York some fifty years ago, before the scope of the code, as to requiring the complaint to contain a statement of the facts constituting the plaintiff's cause of action, was definitely established. The court there, in effect, held that the common-law method of pleading by use of the common counts was abolished by the statute. It was not suggested but that a delivery to one person upon the authority of another, and upon his account, was in legal effect a delivery to such other, and that aside from the restrictions of the code the sale and delivery were pleadable according to their legal effect by the use of the *indebitatus assumpsit* common-law form; but it was said that since the code called for a statement of facts as distinct from legal conclusions, facts could no longer be pleaded according to their legal effect. The same court, about the same time, in *Lienan v. Lincoln,* 2 Duer, 670, condemned the use of the common counts under the code, saying that an allegation that defendant received money or property to the use of the plaintiff was no longer sufficient to permit proof of the facts in that regard; that a use springing from the facts, giving rise to a cause of action in favor of the plaintiff, was a legal result or conclusion from facts, and that the code required the facts, not the conclusion to be stated. Those early decisions were followed in some jurisdictions, as counsel for appellant discovered. *Williams v. Chadbourne,* 6 Cal. 559; *Kelly v. Johnson,* 5 Wash. 785, 32 Pac. 752. Some textwriters have also made the mistake of dignifying such decisions as authoritative. 1 Estee's Pl. § 710.

A broader view of the code obtained in New York as early as 1857, as indicated by *Rogers v. Verona,* 1 Bosw. 417, cited by respondent's counsel, where it was distinctly held that facts such as those relied upon here for a cause of action were pleadable by the use of the common-law form, and that the code was not intended to and did not abrogate that mode of pleading. The case upon the trial was dismissed on the supposition that *Smith v. Leland* was a ruling authority. There is no room for controversy but that the later case is the correct one. In the recent edition of Wait's Law & Pr. vol. 3, p. 277, it is said:

"There was at one time some difference of opinion upon the question whether the code did not abolish common counts, and require every cause of action to be stated specially. . . . But it is now entirely settled that the mode of declaring upon the common counts is proper now, as it was before the code."

See 4 Ency. Pl. & Pr. 611, to the same effect. This court has several times so decided. *Grannis v. Hooker,* 29 Wis. 65; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800. The theory of those decisions is that the code calls only for a statement of ultimate facts; that it excludes mere legal conclusions and matters of evidence; that an ultimate circumstance may and often does have two aspects: that of a conclusion of fact, and a conclusion of law; in which case it is not a mere matter of law falling within the rule of exclusion, but may properly be viewed in its aspect as a fact and be pleaded as such, the minor circumstances being treated as evidentiary thereof. *Harpending v. Shoemaker,* 37 Barb. 270, 291. The rule is well established now, that in such cases facts may be pleaded according to their legal effect. 12 Ency. Pl. & Pr. 1023; *South Milwaukee Co. v. Murphy,* 112 Wis. 614, 88 N. W. 583; *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159.

Many illustrations found in the decisions of this court, of the method of pleading above indicated, might be given. In

Frankfort Bank v. Countryman, 11 Wis. 398, it was held that all the esentials to the liability of an indorser of commercial paper can properly be pleaded by alleging that the paper was duly presented for payment, that it was duly protested for nonpayment, that notice thereof was duly given to the indorser, and that the paper remained unpaid. *Cutler v. Ainsworth,* 21 Wis. 381, is to the same effect. In *McKinnon v. Vollmar, supra,* a sale of land by the defendants to the plaintiff, the later being induced to enter into the transaction by false representations of the former through their agent, a timely rescission of the transaction by such plaintiff, so far as it was possible for him to do so, and a demand for the return of the money paid, were deemed evidentiary circumstances sustaining the cause of action stated in the form of the common counts for money had and received by the defendants to the plaintiff's use. In *Lessard v. N. P. R. Co.* 81 Wis. 189, 51 N. W. 321, the act of a person performed by his agent was held properly pleaded according to the legal effect thereof, that is, as the act of the principal. So it seems that the ancient decision upon which counsel for appellant rely is not a ruling authority. The decisions of this court and those elsewhere are to the contrary. The objections to evidence upon the ground of insufficiency in the allegations of the complaint were properly overruled.

It is claimed that there was a controversy as to whether defendant, by its agent, agreed to pay for the goods delivered to Gates, and that the referee failed to decide such issue. Counsel in that seems to overlook the general finding following the allegation of the complaint that the sale and delivery was to the defendant. That necessarily involved a promise, express or implied, upon the part of defendant, to pay for the property. The finding in regard to the matter might well have been more specific; but since the issues were covered it cannot well be doubted that there is no infirmity in the judgment on that score.

A further claim is made that charges for money paid to Gates or upon his order to the amount of $17.25, were improperly included in the judgment, and such claim is conceded by respondent's counsel; though they insist that there is no merit in the appeal in that regard, since it was agreed upon the trial that all the items of money should be deducted from the claim set forth in the complaint, and that the omission to do so was a mere mistake that would have been promptly corrected without any appeal, had appellant called respondent's attention to the matter. That seems evident from the record. It was agreed before the referee and also before the court that all charges for money should be withdrawn from the case. In such circumstances the rule is that, while the judgment may be reduced to the proper amount in this court, that cannot avail the appellant as regards costs here. *Menz v. Beebe,* 102 Wis. 343, 77 N. W. 913, 78 N. W. 601; *Windross v. McKillop,* 98 Wis. 525, 74 N. W. 342.

The further point is urged that the decision as to authority of Hinman to bind appellant is contrary to the evidence. We shall not discuss that subject. It is sufficient in our judgment that there is ample evidence in the record tending to support the finding, and that there is no clear preponderance of evidence against the conclusion reached.

It is said that no finding was made as to what the agreement with respondent was. That is clearly a mistake, except in so far as there was no specific finding going into the details. There was the finding heretofore alluded to that the goods were sold and delivered to defendant at its special instance and request. The finding was as full as the complaint. The same rule that holds the complaint good must hold the finding good also. The finding of the legal effect of evidentiary facts, such effect being in a proper sense an ultimate issuable fact, involved, necessarily, a determination respecting the existence of all the minor circumstances upon which it depended. The failure of the court to incorporate

the decision respecting the detail facts in the findings does not constitute reversible error. It does not constitute error at all, since, as we have seen, the issues of fact, as properly raised by the pleadings, were all passed upon.

The remaining question for consideration concerns the finding that appellant, through its agent, was the purchaser of the merchandise delivered by respondent, as to whether it is contrary to the clear preponderance of the evidence. It must be conceded that if the credit was extended to Gates as primary debtor—the agreement with appellant's agent in its behalf, if one were made, being to answer for the default of the principal, to stand as security merely—no legal liability was incurred thereby, since the agreement, being verbal, is condemned by the statute of frauds. Sec. 2307, Stats. 1898. It is infrequent, where there is credible evidence that would render the determination of an issue of fact, if made by a jury, proof against attack upon appeal, that it is in serious danger of reversal, though made by the court or a referee; since elements may exist liable, legitimately, to have great weight with the latter which cannot in the very nature of things be preserved in the record. It has often been said that a clear case of error must exist in respect to a trial court's finding of fact to warrant a reversal thereof because contrary to the evidence; that to appreciate the scope of such rule one must understand that it should appear not only that the finding is against the weight of the evidence, but so clearly that way, after giving due weight to the special opportunity of the trial court for discovering the truth, as not to be reasonably explainable upon any theory other than that in some way material evidence or circumstances were overlooked or wrong rules of law were applied to the evidence. True, as has been said, in testing the correctness of such a finding it must be kept in mind that there is a wide range between clear preponderance on one side of a controversy and preponderance on the other. It is so

wide that,—when all fair doubts are resolved in favor of the trial court's decision, as they should be, having regard to the superior advantages it possesses in passing upon the credibility of witnesses and determining the weight that should be given to their evidence,—a full performance of the duty, which is never consciously omitted, to examine the evidence when the exceptions call therefor, results in so few reversals upon mere questions of fact that the labor devoted to the examination of such matters may not be fully understood. It may be that want of appreciation of how manifest the preponderance of the evidence should be against a court's findings of fact to warrant a reversal, and of the weight, in support of the findings, legitimately attributable to nonrecord elements, leads to many useless appeals. That would appear by taking note of the numerous instances of retrials here, so to speak, on mere matters of fact, and the small percentage of reversals in such cases.

Notwithstanding the obstacles above indicated, in the way of obtaining relief from a judgment because of errors in determining facts from evidence, it seems that they should be considered fully met in this case as to the finding that appellant, as principal, agreed to pay for the goods delivered to Gates. On the side of respondent, his evidence in chief, and that of Gates as well, in one aspect, is to the effect that appellant's agent so agreed. The literal sense thereof would convict appellant of being the original promisor; yet it is susceptible of a meaning that only a collateral promise was made. There is not a circumstance in the case supporting the former view, while the evidence of both respondent and Gates, in giving the details of what occurred between them and the agent, and all the evidentiary circumstances in the case, some of them being wholly inconsistent with the making of an original promise by such agent, indicate that if any promise was made it was collateral to that of Gates. We will refer to such circumstances in detail.

1. Respondent testified that Gates was represented to him by the agent as a safe man to deal with. That was material for respondent to know if he was to take Gates as his debtor, but not if appellant, who was of well known responsibility, was to stand as the original promisor.

2. Respondent later testified, when called upon to give more in detail the conversation of the agent, that the expression used by him was that appellant would "stand behind" Gates. That clearly would indicate that the promise of the agent, if any was made, was understood to be collateral.

3. When called upon to explain in detail the conversation, Gates further said his understanding was that his orders, issued to Andresen for merchandise, would be paid. That clearly indicates a collateral promise.

4. The goods, as furnished, were regularly charged to Gates, though respondent testified that he wrote on the ledger, after Gates' name, "For Upham Manufacturing Co."

5. While it was not claimed that there was any original promise on behalf of appellant to pay for anything but merchandise, respondent furnished Gates with money from time to time, as well as goods, charging all to him as debtor.

6. While there was an account for goods furnished Gates prior to the one in question, and such accounts thereafter, which were paid by appellant upon Gates' orders, the prior account was rendered as the latter's debt and paid as such upon his written order; and the later accounts were specially guarantied by appellant and paid because so guarantied, not because of any promise made in May, 1899, relied upon by respondent.

7. The account in question was first sent to appellant as a debt of Gates to respondent. Nothing was done in connection with the matter to indicate that respondent looked to the former as the primary debtor.

8. The account not being promptly paid, respondent wrote appellant, stating in substance that the agreement made by

the latter's agent was that appellant would "stand behind" Gates; that the understanding was that respondent "would have to carry him" till a specified time. That unmistakably indicates a collateral promise.

9. Some time later respondent again wrote appellant with the view, as he said in effect, of stating his case fully. Proceeding to do so, he informed appellant that its agent promised in these words: "Your company would stand behind Gates for such amounts as he might buy from me." There can be no reasonable controversy but that if such were the language used between respondent and the agent at the outset, the parties understood that an extension of credit to Gates as the primary debtor was contemplated upon the collateral promise of appellant as security.

10. Respondent, in explanation of the circumstances that he charged the merchandise to Gates instead of to appellant, said that he did so to keep the account separate. He admitted, however, that there was no account to keep it separate from, since he had none with appellant or Gates during the time the one in question accrued, nor for a long time theretofore or thereafter.

11. The agent denied unequivocally having made the arrangement with respondent claimed by him, or having had any such conversation with him as he testified to.

Thus the evidence of Andresen and Gates, as before indicated, as it appears unimpaired by that elicited upon the cross-examination, in one aspect is consistent with the theory that a collateral promise was made, which harmonizes with all the other evidence and circumstances in the case. In the other aspect it is clearly impeached by such witnesses, and by all the evidence in the case bearing on the question. So, viewing the record, we cannot escape the conclusion that the finding under consideration is against the clear preponderance of the evidence, and most decidedly so. It seems that the referee and the learned trial court must have failed to

give effect to some of the evidence, or applied, as before suggested, wrong rules thereto.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of defendant for costs.

MAXCY, Respondent, vs. MCCORD, imp., Appellant.

February 2—February 23, 1904.

Jurisdiction: Residence: Service of process outside of state: Effect: Judgment for costs: Construction.

1. In an action against a non-resident, the court has no jurisdiction of the person to enable it to render a money judgment for costs, where such defendant is served with process only outside its territorial jurisdiction.
2. In an action on a tax deed to bar former owners, judgment was by default that defendant McC. (who was personally served in Idaho, pursuant to order for service outside the state), and O. (who was personally served in Wisconsin), be forever barred from all right in the described lands, "and that plaintiff have his costs and disbursements in this action, taxed at," etc. *Held*, that reference to the record disclosed affirmatively that the judgment for costs could not be construed as personally enforceable against McC., and hence was not prejudicial as to him.

WINSLOW and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action on tax deed to bar former owners against appellant, *McCord,* and Ogilvie. The latter was served personally in Wisconsin. The appellant, being nonresident, was personally served in Idaho, pursuant to order for service outside the state. Judgment was by default that *W. E. McCord* and S. C. Ogilvie, and all persons claiming under them, "be-

and they are hereby, forever barred from all right [in described lands], and that the plaintiff have his costs and disbursements in this action, taxed at $45.95." The defendant *McCord* appeals from "that part of the judgment giving the plaintiff costs against said defendant."

The cause was submitted for appellant on the brief of *Luse, Powell & de Forest,* and for respondent on that of *A. W. McLeod.*

DODGE, J. Appellant insists that, having been served with process only outside its territorial jurisdiction, the court had no jurisdiction of his person to enable it to render a money judgment against him for costs. This is undoubtedly correct. *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565; *Jarvis v. Barrett,* 14 Wis. 591; *Moyer v. Koontz,* 103 Wis. 22, 24, 79 N. W. 50; *Zimmerman v. Gerdes,* 106 Wis. 608, 82 N. W. 532. We fail, however, to find any personal judgment against the appellant in the record. The judgment quoted in the statement of facts merely declares that the plaintiff shall have the specified sum as costs, but does not declare the person from whom he is to recover. Such judgment may not be invalid, but, if valid against any one, it can only be so because helped out by the record showing the person who is so liable. When, however, we refer to that record, it discloses affirmatively that another person is liable, and that the appellant is not. An ambiguous judgment must, if reasonably possible, be so construed as to exclude error. This judgment, not in terms awarding recovery of costs against appellant, cannot have such error imported into it by construction. We are satisfied, in the light of such record, that the judgment appealed from could never be construed as personally enforceable against this appellant; hence that no error prejudicial to him lurks therein.

By the Court.—Judgment affirmed.

WINSLOW, J. In my opinion, a judgment like the present one, which adjudges that the plaintiff have certain specified relief against two defendants (naming them), and that he have his costs, means that he have his costs of the defendants so named, or else it means nothing. It must be a judgment against both or neither. There is no more warrant for saying that it was intended to be a judgment against Ogilvie alone than there is for saying that it was intended to be a judgment against *McCord* alone. The same equitable relief was claimed and obtained against both. In my own opinion, it is an unqualified and unambiguous judgment against both defendants. I have little doubt but that the clerk of the court has so construed it, and docketed the judgment against both. If this be the case, then the appellant is obliged by this judgment to pay costs, although he is, to all practical intents and purposes, the prevailing party. He has been relieved from an unauthorized judgment standing against him on the records of the trial court, but has been obliged to pay costs to the party responsible for the entry of the judgment. I think the judgment appealed from should be reversed as to the appellant.

MARSHALL, J. I concur in the views expressed by Justice WINSLOW.

THE STATE EX REL. JENSEN, Respondent, vs. YANKEE, County Clerk, Appellant.

February 2—February 23, 1904.

Towns: Vacation by county board: Statutes: Construction.

Ch. 253, Laws of 1899, declared in its title to be incorporated into the statutes as sec. 671*a*, relating to the powers of county boards to vacate towns, after describing the petition required,

and the manner of holding an election thereon, provides, that in case the majority of votes cast are in favor of the vacation, and that fact properly certified by the county clerk, the county board "shall have power to vacate" such town. *Held*, that it was the legislative intent that ch. 253, should, with secs. 670, 671, Stats. 1898, form a complete and harmonious system, governing the powers of county boards in relation to vacating towns, and that an ordinance vacating a town passed by a county board without complying with any of the provisions of ch. 253, is void.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Tomkins, Tomkins & Garvin,* attorneys, and *M. E. Dillon,* district attorney, and oral argument by *W. M. Tomkins.*

For the respondent there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

WINSLOW, J. This is an appeal from a final judgment in an action of *certiorari* setting aside an ordinance passed by the county board of Ashland county vacating the town of Ashland, in said county. It appeared by the return that the ordinance of vacation had been passed without complying with any of the provisions of ch. 253, Laws of 1899, otherwise known as sec. 671*a*, Stats. 1898. On this ground the ordinance was held void, and the only question presented by the record is whether the section named was applicable and controlling. The appellant's contention is that the provisions of this section are only applicable when the county board desires to set off and establish a new town with a population of less than 125 inhabitants, and that in all other cases the county board, under the general provisions of sec. 670, Stats. 1898, may vacate a town without complying with the special provisions of said sec. 671*a*. We cannot agree with this contention. There is nothing in the terms of ch. 253 aforesaid which indicates such an intention. That chapter provides generally the proceedings to be followed for the vacation of

a town, not in any particular case, but apparently in all cases, and, after describing the petition required, and the manner of holding an election thereon, provides that in case the majority of votes are cast in favor of the vacation, and that fact be properly certified by the county clerk, the county board "shall have power to vacate" such town. The legislative intent that this chapter shall form a part of the general scheme of the law governing the powers of county boards in relation to the vacating of towns is very evident from the fact that this law is declared in its title to be incorporated into the statutes as sec. 671*a*, and immediately following secs. 670 and 671. Taking these three sections together, there can be little doubt that the legislature intended, by the addition of sec. 671*a*, to make a complete and harmonious system by which a vote of the electors interested is essential to the power of the board to vacate a town, as well as to divide a town. Any other construction would seem to make ch. 253 aforesaid practically useless and absurd. See *State ex rel. Hiles v. Wood Co.* 61 Wis. 278, 21 N. W. 55, where the same construction was impliedly given to sec. 671.

By the Court.—Judgment affirmed.

TOWN OF WASHBURN, Appellant, vs. WASHBURN WATERWORKS COMPANY, Respondent.

February 2—February 23, 1904.

Appeal from justices' courts: Jurisdictional defects: Appeal and error: Record: Bill of exceptions: Waterworks: Franchise: Contracts: Construction: "Leasehold period:" "Franchise period:" "During such term:" "First ten years:" "Tax assessed:" Judgments: Taxation: Public service corporations: Personal property: Findings: Construction.

1. On appeal from a circuit court judgment in an action appealed from justice court and tried *de novo*, whether the circuit court was without jurisdiction of the subject-matter because the jus-

tice did not obtain it is to be solved from the record, which does not include the justice's docket or the minutes of his proceedings unless the same are made a part thereof by a bill of exceptions.

2. A franchise was granted by a municipality to construct and operate a waterworks within its boundaries, to furnish water for public and private use for a period of twenty-five years from its date, and to use the public places to that end, the municipality leasing of the grantee fire hydrants for said term and agreeing to pay a rental of $4,000 per year and the municipal taxes assessed on the property for the first ten years, and to pay $4,000 per year thereafter during such term, payable in two installments of $2,000 each on the 1st days of January and July, earning capacity to commence when, upon the works being tested, they were found to comply with the franchise and contract. *Held:*

   (a) The leasehold period and the franchise period are coextensive, both commencing with the date of the franchise and ending twenty-five years thereafter.

   (b) The words "during such term" refer to the period of twenty-five years, rent, however, to commence when water service commences.

   (c) The words "first ten years" point to the first period of ten years in a period of twenty-five years; and there being no period of twenty-five years except the one commencing with the life of the franchise, the ten-year period commenced at the same time.

   (d) The words "tax assessed" refer to all the proceedings requisite to charge the property or the owner thereof with the payment of taxes, culminating not earlier than when the taxes might be paid.

   (e) The words "for the first ten years" were used in the sense of during the ten years subsequent to the date of the franchise.

   (f) The agreement being to pay the taxes assessed during a period of ten years subsequent to the date of the franchise, it is immaterial whether taxes were assessed during the first of such years, as regards what were the last taxes to be paid.

3. To support a judgment under sec. 1105, Stats. 1898, it should appear that all the issues specified in sec. 1102 were found for the plaintiff, or that defendant failed to appear and answer relevant questions.

4. The franchise, land and chattels of a public service corporation constitute one indivisible thing for the purposes of taxation. The franchise is personal property, and all things of a proprie-

tary nature connected therewith, whether land or movables, partake of its character, and the value of that which is created by the combination of tangible and intangible things forms the legitimate basis for taxation. That is so, generally, by settled judicial policy, and so by statute as to waterworks property.

5. A finding that when the taxes were assessed defendant owned property of the character above mentioned is equivalent to a finding that it owned property of some description sufficient to pay the taxes in question or some part thereof, though such property be not subject to seizure upon execution or tax warrant.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Proceedings for the judicial enforcement of a personal property tax. May 6, 1889, the town of *Washburn,* in Bayfield county, contracted with Weston Lewis and J. S. Maxcy for the construction, maintenance and operation of a system of waterworks in the village of Washburn, in said town, for the purpose of supplying water for public and domestic purposes in such village, granting to them the use of the streets and other public places therein so far as necessary thereto, the town binding itself to pay for the public water service, "an annual rental of $4,000" and "any town or municipal tax which may be assessed against the grantees or their assigns for the first ten years, and an annual rental of $4,000 after the expiration of said ten years," during the life of the contract, that being twenty-five years from the date thereof. The town possessed authority to make the contract. It was assignable on the part of Lewis and Maxcy and was by them assigned soon after its date to defendant. The waterworks system was completed, put in operation, and commenced earning the stipulated rental on October 15, 1889. Thereafter, so far as appears, except as herein stated, the defendant and the town fully performed their respective obligations under such contract. In 1899, in due form so far as appears,

there was assessed upon the waterworks property, for state, county and town purposes, taxes to the amount of $2,294, the same being duly extended on the town tax roll. Due demand was made upon the defendant to pay such taxes, which was refused. Thereupon the treasurer made affidavit as provided in sec. 1100, Stats. 1898, filing it with a justice of the peace of said town of Washburn, who then duly issued a summons, commanding the defendant to appear forthwith to answer under oath and show cause why he should not pay such taxes. Such proceedings were thereafter had in the matter that a trial occurred in respect thereto in the circuit court for Bayfield county, upon appeal from the judgment rendered before the justice. The facts aforesaid appear by the affidavit upon which the summons was issued and the findings made in the circuit court. Such findings are further to this effect: In the year 1899 there was levied and carried out on the tax roll of the town of *Washburn,* against the *Washburn Waterworks Company* upon its franchise, plant, mains, hydrants, real estate and personal property used in the operation of said works, and in its entirety, the sum of $2,294 for taxes, and $45.88 collector's fees, being in all $2,339.88. The property so taxed was owned by defendant and liable to taxation at the time the assessment of such taxes was made. The total taxes carried out on the tax roll of the town of *Washburn* for the year 1899, were state taxes, $8,753.20, county taxes, $18,287.56, town taxes, $61,453.13; total, $88,443.89.

Upon such facts the court decided as matters of law that the town of *Washburn* was liable to pay the taxes assessed upon defendant's property in 1899, and that defendant was entitled to a dismissal of the action with costs. Judgment was rendered accordingly.

For the appellant there was a brief by *W. M. Tomkins* and *John Walsh,* and oral argument by *Mr. Tomkins.*

For the respondent there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

MARSHALL, J. This case comes up on the record of the trial in the circuit court, consisting, at most, of the affidavit for the issuance of the summons, made the complaint by sec. 1101, Stats. 1898, the summons and return of service, the findings of fact and conclusions of law filed in the circuit court, and the judgment. There is no bill of exceptions.

Counsel for respondent contend that, irrespective of any merit in the propositions presented by appellant, the judgment should be affirmed because the justice before whom the action was commenced did not obtain jurisdiction of the subject-matter thereof. Most of the reasons assigned therefor are based on proceedings before the justice, shown by his docket entries, no part of which, by proper proceedings, was incorporated into the record in the circuit court and upon this appeal. Had counsel desired to raise for consideration points not so appearing without a bill of exceptions, they should have presented the facts in respect thereto to the circuit court for consideration, taken rulings thereon and exceptions to such rulings, or in some way gotten such matters before the court, and embodied the same in a bill of exceptions. That course not having been pursued, we can look only to the record, strictly so called, consisting of the papers to which we have referred. *Sellers v. Lampman,* 63 Wis. 257, 23 N. W. 131; *Mathews v. Ripley,* 101 Wis. 100, 77 N. W. 718; *Crate v. Petipher,* 112 Wis. 252, 87 N. W. 1104. No defect is claimed which in any view of the matter is disclosed thereby except in the service of the summons and the proof thereof, and such defects, if any there be, must be regarded as cured by the appeal to the circuit court. *Barnum v. Fitzpatrick,* 11 Wis. 81; *Lowe v. Stringham,* 14 Wis. 222. In *Mathews*

v. Ripley, supra, it was distinctly held that upon an appeal to this court from a judgment rendered in the circuit court on appeal from a justice's court, where want of jurisdiction of the subject-matter by the justice is relied on to defeat the action, and the alleged facts in that regard do not appear by the pleadings, verdict or findings, and judgment rendered thereon, they cannot be considered unless made a part of the record by a bill of exceptions. Attention was there called to the fact that, in previous cases where the jurisdiction of the justice of the subject-matter was challenged upon appeal with effect, there was such a bill, showing the facts relied upon. *Cooban v. Bryant,* 36 Wis. 605; *Henckel v. Wheeler & W. Mfg. Co.* 51 Wis. 363, 7 N. W. 780.

Appellant's counsel contend that error was committed in deciding, in effect, that the ten-year period, during which all town or municipal taxes assessed on the waterworks property were agreed to be paid by appellant, includes the assessment in question. The contract with the city is dated May 6, 1889. It provides, among other things, as follows:

(1) "The rights and privileges herein granted to continue for a term or period of twenty-five years from and after the passage of this ordinance."

(2) "The said waterworks shall be . . . completed to successful operation on or before the 15th day of October, 1889."

(3) "Upon the completion of said works they shall be tested, . . . and if successful the rental for fire service herein stipulated shall begin."

(4) "The town of *Washburn* hereby agrees to and does rent from the said grantees or assigns for the term of twenty-five years . . . fifty double discharge frost proof fire hydrants."

(5) "The town of *Washburn* . . . hereby agrees and promises to pay an annual rental of $4,000 together with any town or municipal tax which may be assessed against the grantees or assigns for the first ten years, and an annual rental of $4,000 after the expiration of the said ten years

. . . in semi-annual instalments of $2,000 on the first day of January and July of each year during such term."

(6) "A sufficient tax shall be levied and collected annually upon all taxable property in the town subject by law to such taxation, to meet the payments under this law as they may respectively mature."

That such language is open to judicial construction at many points seems clear, and especially on the subject of whether the words "first ten years" refer to the period of ten years commencing with the acceptance of the waterworks by the town, or the period of like length commencing with the date of the franchise. In solving the ambiguity in that regard we must give due weight to the circumstance that the provision in question is in the nature of a favor to respondent not granted to taxpayers generally. While it cannot be deemed an exemption from taxation, respondent and its grantors were obviously thereby relieved for a long period of time from all danger of being burdened by an increase in the rate of taxation—a very valuable privilege. Upon familiar principles, both because of such advantage not granted to taxpayers generally and because independently of that element the clause is in the nature of a grant from the people in their sovereign capacity notwithstanding the contract feature, reasonable doubts as to its meaning should be resolved in favor of the public, represented by appellant. *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 562, 63 N. W. 746; *Yates v. Milwaukee,* 92 Wis. 352, 66 N. W. 248; *State ex rel. Bell v. Harshaw,* 76 Wis. 230, 45 N. W. 308; Parsons, Contracts (9th ed.) 507.

The word "rental" in subd. 3, must mean the same as that term in subd. 5. Then the rental which was to begin as specified in the former, is the rental to be paid as specified in the latter. That it has reference only to the $4,000 per year, not to the taxes to be paid by appellant, is strongly if not conclusively indicated from the language, in close con-

nection with the specification of the amount of the rental, of the promise of payment thereof in two insalments of $2,000 each. It is pretty clear that the purpose of the contract was not to obligate the town to pay the rental for the full period of twenty-five years, since otherwise the earning period would date from the inception of the contract or would be extended beyond the life of the franchise. The first would be unreasonable, the last absurd; so both should be rejected, at least if some reasonable meaning can be discovered. We would feel bound to reject the latter because of its absurdity, and the former since the contract expressly provides that the earning period shall date from the acceptance of the works. Necessarily we must say, then, that it was contemplated that such period would be for a less term than twenty-five years; yet the obvious fact remains that the first ten years means a period of ten years carved out of a full period of twenty-five years. It will be seen by subd. 1, that the life of the franchise is twenty-five years, and by subd. 4 that appellant became the lessee of the water hydrants for the full term of twenty-five years. The latter period must have been intended to be synonymous with the franchise period and to commence on the 6th day of May, 1889. True, that involves the idea of a leasehold interest in the hydrants before they were in place; but the meaning as indicated is so unmistakable that we cannot well escape adopting it. The only "first ten years" of the period of twenty-five years mentioned in the contract, then, is the period of that length commencing with the life of the franchise and the town's lease of the hydrants. True, the first ten years as to the rental of $4,000 per year is tied to the first ten years as to taxes, but it is followed by the provision for the payment of the rental of $4,000 per year after the expiration of the first ten years "during such term," plainly, as it seems, referring to the balance of the term of twenty-five years for which the hydrants were leased. That indicates,

as before stated, the incurring of an obligation to pay rental upon the lease of the hydrants before the waterworks were in service, standing alone; but it is modified by the provision as to when the earning capacity of the works shall begin, to wit, when the same shall have been tested and found satisfactory under the contract. The necessary result of this reasoning is that the first ten years in question expired May 6, 1899. As the town did not agree to pay ten years' taxes, it cannot be legitimately charged with the taxes in question unless the same were assessed for the last year of such ten-year period within the meaning of the contract.

It is considered that, in the term "tax which may be assessed," the word "assessed" is used in the sense of the levy of taxes rather than the mere determination to raise money by taxation; the proceedings requisite to charge property or the owners thereof with the payment of taxes, not the assessment of property for taxation. The term "assess taxes" is commonly used as synonymous with the levying of taxes, as descriptive of the steps in their entirety necessary to charge specific property with taxes, or the owners with the payment thereof. There is no such thing as the assessment of a tax in the mere sense of the assessment of property for taxation. *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 70 N. W. 77. In the contract in question the term "assessed" plainly refers to the actual creation of an obligation upon the owner of the waterworks property to pay taxes, the actual extension upon the tax roll of the tax apportioned its property, indicating the proportion of the public burdens to be paid on account thereof for any particular year, and steps essential to render the same payable. That was not done, as to the tax in question, till the latter part of 1899, or long after the first ten years of the franchise period of twenty-five years had expired. We take it that the language "for the first ten years" means in the first ten years; not that the parties had in mind the splitting up of any year.

Counsel for respondent suggest that a solution of the foregoing question requires a decision of whether the waterworks property was first taxed in 1889 or 1890. Not so, as it seems to us. It is immaterial when the property was first taxed. The town of Washburn did not agree to pay ten years' taxes upon the property assessed, but did agree to pay the taxes assessed upon the property, or to the owner thereof because of such ownership, for or in the first ten years after May 6, 1889. If no taxes were assessed or levied upon the property for the first of such ten years, that gave respondent no legal right to charge appellant with taxes assessed upon the property in the year succeeding the expiration of such period.

But it is said that, irrespective of whether the taxes in question fall within or without the ten-year period mentioned in the contract, the judgment of dismissal is right because the findings made by the trial court are not sufficient to warrant a judgment in favor of appellant, since they do not pass favorably to it upon each of the questions to be answered under secs. 1102, 1105, Stats. 1898. True, the action could not legally deal with any but personal property taxes; and also true, it was essential to the legitimate rendition of a judgment in favor of appellant that respondent should either refuse to appear upon the trial and answer relevant questions, or that upon evidence warranting the same there should be a finding in appellant's favor upon the three questions specified in sec. 1102, Id., such questions being as follows:

(1) Did the defendant have any personal property liable to taxation at the time the assessment was made?

(2) Has he money or property, real or personal, of any description, sufficient to pay such tax or any part thereof?

(3) Is he justly liable for the payment of such tax or any part thereof?

Counsel express doubt as to whether an affirmative answer

to the first question can be read out of the findings, insists that the second was not answered at all, and that the third was answered in favor of respondent. Such doubt springs from uncertainty, as counsel views the matter, as to whether lands, water mains, franchises and other property of a water company, in use and for use in performing the duties devolving upon it, are personal property for the purposes of taxation. That is not an open question in this state. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554, 51 N. W. 1004; *Fond du Lac W. Co. v. Fond du Lac,* 82 Wis. 322, 52 N. W. 439; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 63 N. W. 746. An examination of those and other cases decided here, that might be referred to, shows that it has been as firmly established as anything can be by judicial determinations, that all the property of a public service corporation, such as appellant, street and other railway companies, and public lighting companies, whether real, personal or mixed, in the ordinary sense of those terms, including franchises other than the mere right to be a corporation, is one entire indivisible thing; that all the parts partake of the nature of the franchise from which springs the public duty, and as that is deemed to be personalty, all should be regarded as such. In that view it would be the height of absurdity to consider value and impose a tax upon one part of such entire thing separate from the rest. There can be no separation without destruction. Therefore the separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itself would be valueless. The plant in its parts as realty and personalty according to the character thereof, irrespective of the combination of all into one entire thing, might be of little value, and probably would be, as compared to what they would represent in the new form,

produced by the union of many parts into one. The great value is produced by the combination of parts into one complete working machine, adapted in a high degree to the service of man. One might as well endeavor to value one part of any mechanical device by itself as to so value the franchise of a public service corporation by itself, or so value its land, or likewise its movables. To do so leaves out of view the great and often chief element of value which is produced by the combination. So in order to deal justly in the distribution of public burdens, the entire property in use and for use in the exercise of the public franchise, for the purposes of taxation, should be regarded as realty, the franchise and movables being viewed as appurtenant to the lands, or the intangible element regarded as personalty, and the physical elements, consisting of lands and movables, be regarded as appurtenant thereto and partaking of its character. The latter seemed upon due consideration by this court in *State ex rel. Milwaukee St. R. Co. v. Anderson, supra,* to be the most consistent with, and really demanded by, the constitutional method of imposing public burdens in the form of taxation, as regulated by the legislation of this state. That was clearly declared and established in such case, so far as the court could do so. It was said, in effect, that the system in vogue here contemplates that everything of value constituting a subject of private ownership and wealth, whether tangible or intangible, which the legislature shall select for the purpose, may be included in the aggregate of property to bear the public burdens of taxation, and in the manner best calculated to take account of values produced by the combination of franchises and other things of value; which can only be attained, as regards the former, which in their very nature are inseparable from the latter without destruction, so to speak, of the body in which inheres the great value, by appraising them as integral parts of the combination, to be viewed in its entirety only, every element being impressed with the

character of the one from which springs the public duty and the necessity for inseparable union with it of tangible things consisting of lands and movables, in order to perform it.

What has been said would be sufficient to show that the effect of finding that the property of respondent, upon which the taxes in question were assessed, belonged to it at the time of the assessment, and consisted of its waterworks, franchise, plant, mains, hydrants, real estate, and other property used in the operation of such works, was to decide that it owned at such time personal property liable to taxation, fully satisfying the first statutory essential to the right of appellant to recover. But the character of the property, as to whether personalty or realty, does not necessarily rest on judicial policy or construction, since in the revision of the statutes of 1898 the principles laid down by the court as indicated, were embodied in a legislative enactment, sec. 1037*a* of such statutes, as regards water and lighting companies.

The finding that respondent owned the waterworks property at the time of the assessment and continuously thereafter down to the time of the trial, in effect found the second statutory requisite to the right of appellant to recover judgment, if personalty, consisting of inseparable parts of a waterworks property, satisfies the call of the statute for "property, real or personal, of any description, sufficient to pay such tax or any part thereof." Counsel for respondent say the question in that regard was not answered by the court at all. Whether counsel mean that it was not formally answered, or not answered because the fact that appellant possessed the waterworks property was not a finding that it owned real or personal property sufficient to pay the tax or any part thereof because there is no finding on the subject of value, or whether they mean that there is no finding that appellant possessed property sufficient to pay the tax or any part thereof because the plant, neither in its entirety nor in its parts, could be taken upon execution, we are left en-

tirely in the dark. True, the learned trial court did not follow the statute. Why the statutory questions were not made a part of its findings, and answered, as they clearly should have been, instead of general findings being made, leaving it to be determined by inference whether the statutory essentials were in fact found or not, we cannot perceive. However, the duty devolves upon us not to allow justice to miscarry if it can be prevented by disregarding errors and defects, however palpable, numerous or inexcusable they may be, which do not affect substantial rights. Sec. 2829, Stats. 1898; *Mauch v. Hartford,* 112 Wis. 40, 62, 87 N. W. 816.

Now there can be no manner of doubt that the finding that respondent owned the property taxed at the time of the trial, in effect decided that it then possessed property, real or personal, sufficient to pay the tax or some part thereof; unless, in order to satisfy the statutory call in that regard, the property must be of a character subject to actual seizure upon execution. The statute does not seem to say that, either in terms or by reasonable inference. The mere fact that the property of a public service corporation like the respondent, cannot be interfered with by a seizure under execution or tax warrant, as held in *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 70 N. W. 77, by no means militates against the right to recover judgment against it in the process of enforcing its legal liabilities. That is done necessarily and universally. Though such a judgment cannot be so enforced as to prevent the performance of the public duties incident to the possession of the public franchise, judicial machinery is ample for its enforcement; and just as ample, of course, in a case of this kind as any other. It is considered that ownership of the property taxed by respondent at the time of the trial, is inconsistent with any other reasonable inference than that it then possessed property sufficient to pay the tax or some part thereof, satisfying the essentials of the statute.

Counsel say that the question as regards whether respondent was justly liable for the tax or any part thereof—the third statutory question—was answered in its favor; and suggest that though such answer is a mere conclusion from the findings preceding it, the statute is thereby satisfied, entitling respondent to the judgment complained of. We are unable to see why an obviously wrong finding can be relied upon by respondent, when properly challenged by appellant, to sustain a judgment in a case like this, any more than in any other. As we have seen, the court should have decided, in answer to the third statutory question, that respondent was justly liable for the tax. That is the necessary conclusion from the verities in the findings. The error must be corrected accordingly. The correction being made, all the statutory essentials to entitle appellant to a judgment will clearly appear.

The judgment appealed from must be reversed, the decision that respondent was not bound to pay the tax in question changed to one that respondent was and is justly liable for such payment, and the cause be remanded to the trial court with directions to render judgment in favor of appellant and against respondent for the amount of such tax, $2,294, with costs.

By the Court.—So ordered.

A motion by appellant to modify the judgment so as to provide for the payment of interest and a two per cent. collector's fee in addition to the sum of $2,294, tax and costs, was denied April 19, 1904.

FRELS, Appellant, vs. LITTLE BLACK FARMERS' MUTUAL INSURANCE COMPANY, Respondent.

February 3—February 23, 1904.

Fire insurance: Assignment of policy after adjustment of loss: Rights of assignee: Garnishment: Failure of garnishee to disclose claims of third person: Contract limitation of actions: Waiver: Estoppel.

1. After an adjustment of a fire loss, the assured assigned and transferred his interest in the policy by an instrument reciting that, for a valuable consideration, "the holder of the within policy . . . hereby sells, transfers and sets over, all his interest in and to said policy . . . giving (the assignee) full power and authority to collect the same" as the insured could do himself, if he still owned the policy. *Held*, that right of the assignee to the proceeds of the adjusted loss was absolute as against his assignor.
2. In such case, the fact that no fund is shown to have been in the hands of the insurance company as due on the policy, or then enforceable by action, cannot stand in the way of an equitable transfer of the proceeds of the policy, if the claim is thereafter definitely established under the facts and circumstances as they existed when the assignment was made.
3. An insurance company, after it had adjusted the loss of P., was notified by F. that P. had assigned the policy to him. Thereafter the insurance company was summoned as garnishee of P., but failed to disclose the assignment or the claims thereunder of F., who was not a party to and did not appear in the garnishment action. *Held*, that a judgment against the insurance company in the garnishment action did not prevent F. from recovering from the insurance company the full proceeds of the policy.
4. In such case, it was the duty of the insurance company to bring the fact of such assignment to the attention of the court by setting it up as a defense.
5. A policy of insurance contained this provision: "Any suit or action for the recovery of any claim by virtue of this policy, shall not be sustained in any court unless such suit or action be commenced within twelve months after the loss occurred." A loss under the policy having occurred, it was adjusted, and shortly thereafter plaintiff gave notice that he claimed the proceeds as assignee of the insured. The company never asserted any de-

fense against their liability, but their correspondence showed that they stood ready to pay the loss but for garnishment proceedings pending. In an action by such assignee, to recover the amount of such adjusted loss, brought more than one year after the loss, it was *held* that the insurance company was estopped from asserting any defense under the contract limitation above quoted.

APPEAL from a judgment of the circuit court for Taylor county: B. F. DUNWIDDIE, Judge. *Reversed.*

This is an action by the assignee of an insurance policy to recover the amount due for a loss under the policy. The facts stipulated and admitted by the pleadings, so far as material, are: The policy was for $200, and ran from July 3, 1896, to July 3, 1901. It was issued to George M. Pulsipher, and covered property, including his barn. On May 31, 1901, the barn was totally destroyed. The insurance company and the assured adjusted the loss, pursuant to the agreement in the policy. After such adjustment the company issued the following order:

"Little Black, Wis., June 7th, 1901.

"To Otto Schuster, Treas.:—

"The fire of George Pulsipher's barn has been adjusted by Fred Kaemmerer and Peter Wuest and he is entitled to one hundred seventy-five dollars, $175.00, which amount you will pay him on or before ninety days from date and oblige.

"JOHN KRAEMER, Prest.

"FRED KAEMMERER, Sec., of the *Little Black Farmers' Mutual Insurance Company.*"

This order was given to the treasurer of the company. On the 18th of June the assured assigned and transferred his interest in the policy and what was due thereon by the following assignment:

"The holder of the within policy, for the consideration of the sum of thirty-five (35) dollars and other valuable consideration hereby sells, transfers and sets over, all his interest in and to said policy, to *August Frels,* for his own use and benefit, giving him full power and authority to collect

the same, as he could do himself, if he still was the owner of it.

"Dated, Medford, Wis., June 18th, 1901.

"G. M. PULSIPHER."

On the 20th of June, appellant, the assignee, gave notice of this assignment to Fred Kaemmerer, the secretary of the company, by showing him the written assignment. On the 21st of June appellant gave verbal notice of this assignment to Otto Schuster, the treasurer of the company, at which time Schuster informed him that the garnishment summons attaching the proceeds on a claim against Pulsipher had been served on the company that day, and that the company refused payment to the assignee of the amount as adjusted, because such garnishment proceedings had been commenced and were then pending. On June 27th appellant, through his attorney, notified the treasurer of the company in writing of the assignment, giving notice that, if the payment was refused, an action would be commenced against the company to enforce payment of the amount due him as assignee under the policy. The garnishment action was tried on July 22, 1901. The respondent insurance company appeared, but did not set up or bring to the court's attention the assignment of the claim by the assured to appellant, either on the return day in the garnishment action nor at any other time before judgment therein; nor did it tender the defense to appellant, but made oral answer as follows upon the trial, as the justice's docket entries disclose.

"Anton Feddick v. George Pulsipher, Defendant, and *The Little Black Farmers' Insurance Company,* a corporation, and Otto Schuster, garnishee, Defendants.

"Otto Schuster, as treasurer of the *Little Black Farmers' Insurance Company,* and himself, having been summoned to appear before me on the 1st day of July, 1901, at two o'clock p. m., and answer touching his liability as garnishee of Geo. Pulsipher, against whom said plaintiff has commenced action before me, and said garnishee having appeared on the

1st day of July, 1901, at two o'clock p. m., I proceeded to examine said garnishee touching the matters alleged in the affidavit of complaint. The said garnishee, being first duly sworn, makes answer as follows: 'I am treasurer of the *Little Black Farmers' Insurance Company,* a Wisconsin corporation. The company owes Geo. Pulsipher one hundred seventy-five dollars on account of the burning of his barn. This money is owing to him. It is due about September 2, 1901. I do not owe Geo. Pulsipher anything personally. The committee examined the claim, and allowed the same, and the secretary notified me that the loss was $175.00, which I should pay to George Pulsipher. There is nothing more for the company to do in order for me to pay it over. This money is under my control.' "

Notice was served by the defendant to appeal this garnishment action. The justice made the return to the Taylor county circuit court, where the appeal was dismissed on June 25, 1902. On June 27, 1901, the treasurer of respondent was notified in writing of appellant's claim under this assignment, and that it was made prior to the service of the garnishee summons. Appellant, as assignee of this claim, on June 30, 1902, repeated his demand for payment on the company, which was denied on July 3, 1902, by letter of the president of the company, stating that the assignment was without the consent of the company, and, further:

"The treasurer of our company has orders from justice court to pay A. Feddick $138.00 out of this insurance money. Now, this decision was confirmed by J. K. Parish, circuit judge, and as soon as the costs in this court are adjusted you are welcome to the balance of the money. Otto Schuster was telling me that you want to sue the insurance company for the whole amount, but as long as the company was willing to pay, but did not know to whom, I cannot see why you want to sue us."

The present action was commenced on November 21, 1902. The company alleges as defenses that it was not commenced within the twelve months next after the loss had occurred, as

limited by the provision of the policy; and that it (the company) is discharged to the extent of the amount paid by it pursuant to the order of the justice in the action of Anton Feddick v. Geo. Pulsipher (the assured) and this respondent, as garnishee. The court awarded judgment in respondent's favor upon the ground that the cause of action was barred because not brought within the period of limitation fixed by the policy, and for costs. This is an appeal from such judgment.

For the appellant there was a brief by *Textor & Cook* and *Herman Leicht,* and oral argument by *Mr. Leicht.*

For the respondent there was a brief by *Schweppe & Urquhart,* and oral argument by *E. H. Schweppe.*

SIEBECKER, J. The first question presented upon the pleadings and admitted facts is whether appellant is the owner of the claim covered by the policy. It appears from the foregoing statement of facts that the acts of the parties to the assignment are not questioned. The assignment is in terms a transfer, for a valuable consideration, of all the assured's interest in and to the policy, and clearly indicates an intention to pass all the assured's interest in and arising out of it. Under these circumstances the right of appellant to the proceeds of the policy cannot be questioned as between him and the assignor. *Skobis v. Ferge,* 102 Wis. 122, 78 N. W. 426; *Jones v. Mayor, etc.,* 90 N. Y. 387; *Schilling v. Mullen,* 55 Minn. 122, 56 N. W. 586. The fact that no fund is shown to have been in the hands of the company as due on the policy, or then enforceable by action, cannot stand in the way of an equitable transfer of the proceeds of the policy, if the claim is thereafter definitely established under the facts and circumstances as they existed when the assignment was made. *Chapman v. Plummer,* 36 Wis. 262, and cases cited. The assured relinquished all rights in and under the

policy, and appellant asserted full and complete ownership to all the proceeds.

It is shown that appellant gave notice of the assignment to him by exhibiting on June 20th the written assignment, indorsed on the policy, to Fred Kaemmerer, the secretary of the company; and that he gave verbal notice to Otto Schuster, the treasurer of the company, on the following day, and on the succeeding 27th of June caused his attorney to notify the treasurer, in writing, of the assignment, and demanded payment of the sum due or to become due under the policy, and in default of payment gave notice that an action would be brought to enforce the claim. It is asserted, however, that the company is liable to appellant, as such assignee, for no more than the balance after deducting the amount paid by it to the justice in the garnishment action. Respondent was summoned as garnishee in the action in justice court against George M. Pulsipher, the assured, on the 21st day of June, 1901. It appeared by Otto Schuster, the treasurer, who made answer for it on July 1, 1901, touching its liability as such garnishee. It answered, admitting the loss resulting from the burning of Pulsipher's barn, that the same had been duly adjusted at the sum of $175, and that this sum was owing to George M. Pulsipher and due him about September 2d, following. In its answer as garnishee it wholly omitted to state or bring to the attention of the court the fact that such claim under the policy had theretofore been duly assigned to appellant, nor did it tender him the defense in the garnishment action. The facts clearly establish that respondent had been fully informed and notified of the assignment of the claim to appellant when it was served, and before it answered in the garnishment action. It is also without dispute that appellant was no party to and in no way appeared in this action. Under these circumstances there is no basis for holding that the judgment in

that action could in any way conclude appellant as a party claiming title to the proceeds of the policy. *Adams v. Filer,* 7 Wis. 306; *Winner v. Hoyt,* 68 Wis. 278, 32 N. W. 128; *Coleman v. Scott,* 27 Neb. 77, 42 N. W. 896.

It is urged in respondent's behalf that it is relieved from paying any sum it paid into court under the order of the justice as such garnishee upon the debt of George M. Pulsipher, the original owner of the policy. This contention cannot prevail, since respondent wholly omitted to take the proper and necessary steps in that action to so protect itself. It had full knowledge of the owner's assignment of the policy and its proceeds to appellant, and his interest therein, before it answered in the garnishment action. This information cast upon it the duty of bringing it to the attention of the court by setting up this matter as a defense to the action. In *John R. Davis L. Co. v. First Nat. Bank,* 84 Wis. 1, 54 N. W. 108, this court held:

"Our statutes seem certainly to contemplate that the garnishee shall set forth in his answer any claim which third persons, to his knowledge, may have upon the property in his hands (S. & B. Ann. Stats. secs. 3721–3723*b;* Id. sec. 2760, subd. 5); the policy being apparently to bring all the conflicting claims as well as the parties making such claims before the court in order that all questions as to the ownership of the specific property in question may be settled in one proceeding. . . . Fairness and good faith require that when the garnishee knows of an assignment and transfer of property in his hands he should disclose the fact in his answer." *Adams v. Filer, supra; Coleman v. Scott, supra; Pierce v. C. & N. W. R. Co.* 36 Wis. 283; *Wilson v. Groelle,* 83 Wis. 530, 53 N. W. 900.

The rights of the attaching creditor in the garnishment action could be no greater than the rights of the defendant (George M. Pulsipher) to the property in the possession of or debts due or to become due from the garnishee. It follows that there was nothing due or to become due from respondent to George M. Pulsipher at the time of the commencement

of the garnishment action, and that the company failed to take the necessary legal steps in the garnishment action to protect itself from liability to the assignee.

Respondent's counsel asserts that appellant's attorney appeared in the garnishment action, and set up appellant's claim, and that appellant's right to this money must have been litigated upon the trial of that action. This, however, is disputed, and the record does not sustain the contention. We find nothing in the record to show that appellant appeared in the case by attorney or in his proper person. The record of the trial as returned by the justice contains nothing tending to show this fact, but discloses that appellant was no party to the action, and in no way appeared therein.

The question remains whether this action is barred by the limitation expressed in the policy providing:

"Any suit or action, for the recovery of any claim by virtue of this policy, shall not be sustained in any court . . . unless such suit or action be commenced within twelve months after the loss occurred."

This condition in policies has been considered by the courts, and it is held may, like others inserted for the protection and benefit of the insurer, be waived. When the conduct and statements of those authorized to act for the company is such that a reasonably prudent man would anticipate that a claim will be paid, and that it will not be resisted under any condition of the policy, then the company will be estopped from claiming the benefit thereof. This is upon the equitable principle, enforced by the courts, that, if the company through those who are authorized to speak for it, either by words or conduct, has induced the assured to refrain from doing that which he otherwise would probably have done, in view of the conditions of the policy, then it will be estopped from asserting the forfeiture it has so induced, to the prejudice of the assured, who has given faith to such statements or reasonable inferences from such con-

duct. In the following cases this principle of estoppel is considered and approved: *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, and cases cited; *Kidder v. Knights Templars & M. L. I. Co.* 94 Wis. 538, 69 N. W. 364; *Black v. Winneshiek Ins. Co.* 31 Wis. 74; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 1 N. W. 393; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108; *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *Phenix Ins. Co. v. R. B. H. Lodge,* 41 Neb. 21, 59 N. W. 752; *Ide v. Insurance Co.* 2 Biss. 333, Fed. Cas. No. 7,001; *Insurance Co. v. Wilkinson,* 13 Wall. 222; Joyce, Insurance, § 3207; May, Insurance, §§ 488–508. Do the facts furnish a basis for the application of this rule to the parties in this case? The officers of the company and the assured adjusted the loss on the seventh day after the fire, which occured on May 31st, and issued and delivered an order to the treasurer, directing him to pay it on or before ninety days. On the 21st of June following, after respondent had been informed by appellant that he owned the policy under the assignment and claimed the proceeds thereof, he was informed and notified by the treasurer of the company that garnishment proceedings had been commenced and were then pending, "and that for that reason payment was refused." This clearly implied that the company made no objection to its liability under the policy, and that it stood ready to pay the loss whenever the garnishment action was terminated. That this was the only ground upon which the company refused to pay appellant the amount is confirmed by its subsequent conduct in justices' court on July 1st, in admitting liability on the policy for the amount of the loss as adjusted, without aserting any other defense; and also by the president's letter written to appellant on July 3, 1902, declaring the company had been willing to pay this loss, but did not know to whom. After the appeal in the garnishment action was finally dismissed in the circuit court on June 25, 1902, more than a year after the loss occurred,

respondent again demanded payment from the company on June 30th following, which was refused by the president's letter (July 3d), asserting ignorance of the assignment, and offering payment of the balance due on the policy above the amount paid into justices' court. These facts and circumstances clearly show that the company claimed no defense as against their liability, and stood ready to pay the loss but for the garnishment proceeding. These representations and conduct of its officers were well calculated to lead appellant, as a reasonable man, into the belief that it would not insist upon the condition of the policy which limited the time for bringing an action on the policy to twelve months after loss. To now permit the company to set up this limitation would give it an advantage over appellant which would be against equity and good conscience, and it should not be permitted to avail itself of such advantage. We must hold that respondent is estopped from asserting this defense, and that appellant is entitled to judgment upon the admitted facts of the case.

By the Court.—Judgment reversed, and the cause is remanded, with directions that the court award judgment to appellant for the sum of $175, with interest and costs.

BEASER, Appellant, vs. BARBER ASPHALT PAVING COMPANY and another, Respondents.

February 3—February 23, 1904.

Municipal corporations: Special assessments for street improvements: Validity: Equity: Remedies.

Where a city has general power to cause streets to be improved at the expense of a private owner, and the amount assessed is not more than his proper share of the reasonable cost of such improvement, if from irregular exercise of that power, or other

cause, not affecting adversely the burden imposed on him, the imposition be illegal or invalid, the private owner must find his remedy under the strict rules of courts of law, and a court of equity will, in the exercise of its discretion, refuse him its peculiar forms of relief.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action by lot owner against the city and its officers and the *Barber Asphalt Paving Company* to declare void claims of the latter against plaintiff's property under either special assessment certificates or special improvement bonds for paving, and to enjoin the city from issuing either certificates or bonds. The material facts found are that on June 30, 1902, the city entered into contract with the paving company to asphalt the main street of Ashland; such work to be mainly paid for by special assessment, not exceeding benefits to the abutting lots, but part by the city, to the extent of some $8,800. At the time of the contract the city was indebted beyond the five per cent. limit, but had in its street improvement fund about $11,000; such fund being the one from which such expenses as the contract called for were customarily paid. The work was completed about October 18, 1902, and formally accepted November 10, 1902, and the defendant city paid the amount of money due from it, and the special assessment certificates were issued against the property, including that of plaintiff, all prior to the commencement of this action. The plaintiff had full knowledge of the condition of the street before the proceedings by the city government to cause paving to be done by special assessment, of the letting of the contract to the company, and of the doing of the work from day to day by the company. He consulted counsel with reference to an action to prevent the levy of assessments or issue of certificates, but was advised by the attorney to wait until the work was completed, and, upon such advice, remained quiet, and gave no notice of any ob-

jections. The company is a foreign corporation, having its principal place of business at Chicago, Illinois, engaged in the business of asphalt paving, and had not at any time prior to October 30, 1902, complied with the requirements of sec. 1770*b*, Stats. 1898; being in ignorance of such requirement until about October 18, 1902, after the work had been completed. Judgment was entered dismissing the complaint, from which the plaintiff appeals.

For the appellant there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

For the respondents there was a brief by *George F. Merrill,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Frank M. Hoyt.*

DODGE, J. The judicial policy of this state has now become thoroughly settled that courts of equity will not lend their aid to shield from payment or from the burden of certificates of special assessments for public improvements when the municipality or other governmental representative had general power to cause such improvements to be made at the expense of the private owner, and the amount assessed is not more than his proper share of the reasonable cost of such improvement; that if, from irregular exercise of that power, or other cause, not affecting adversely the burden imposed on him, the imposition be illegal or invalid, he must find his remedy under the strict rules of courts of law. The reason upon which this policy rests is that such a person will not suffer an unlawful burden from the equitable viewpoint, even if he pays what is assessed upon him; hence that courts of equity, although vested with full power, will, in the exercise of their discretion, refuse him their peculiar forms of relief. *Knapp v. Heller,* 32 Wis. 467; *Cook v. Racine,* 49 Wis. 243, 246, 5 N. W. 352; *Hixon v. Oneida Co.* 82 Wis. 515, 531, 52 N. W. 445; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 214, 77 N. W. 167; *State ex rel. Hallauer v. Gosnell,*

116 Wis. 606, 93 N. W. 542. The plaintiff here seems to fall completely within the above-described predicament. The city had full power under its charter to cause the streets in front of plaintiff's premises to be improved as they were at the expense of the premises, to the extent of benefits conferred. Due jurisdiction was acquired. The amount assessed was ascertained by proper statutory tribunal to be plaintiff's due proportion of the cost of the improvement, and not more than the special benefit to his premises, and the facts so ascertained are not questioned. The work has been done at much expense to some one, and the benefit has been received by the plaintiff. In this situation, under the authorities above cited, he will suffer nothing of inequity if he be compelled to pay the sum assessed, which, as already stated, is not more than "the just measure of the labor and material required" for the improvement. *Gleason v. Waukesha Co.* 103 Wis. 225, 233, 79 N. W. 249.

The only objection raised to even the strict legal validity of this charge is that the contract between the city and the paving company was void because the city thereby became indebted, when its debt limit was already exceeded, and because declared void by sec. 1770*b*, Stats. 1898; the paving company being a foreign corporation, and not having complied with that statute. If, however, such invalidity of the contract be conceded, that does not vary the equitable situation. However complete a nullity the contract, the work has been done, and the benefit conferred on plaintiff, who therefore is in no situation to ask a court of equity to shield him from paying the reasonable cost thereof. Especially immaterial is the invalidity of the contract, predicated upon sec. 1770*b*. That section only renders the contract void on behalf of the foreign corporation, leaving the obligation thereof as against it unimpaired, so that at every moment after the contract was executed the paving company was bound and compellable to carry it out as fully as if no such statute ex-

isted. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904. Plaintiff therefore was at all times as perfectly assured of the performance of the work, and of the benefits to result therefrom, as if the contract were entirely valid, and in no different situation in any respect because of the failure to comply with sec. 1770*b*.

For the reasons stated, we are satisfied that the trial court correctly dismissed the complaint, and need not consider certain other grounds on which it is claimed the judgment may also be supported.

By the Court.—Judgment affirmed.

R. CONNOR COMPANY, Appellant, vs. GOODWILLIE and another, Respondents.

SAME, Respondent, vs. SAME, Appellants.

February 4—February 23, 1904.

New trial: Discretionary orders: Costs: Appealable orders: Practice.

1. The granting of a new trial is within the discretionary power of the court, and will not be reviewed on appeal unless the court has abused its discretion.
2. On the granting of a motion for a new trial costs should be imposed upon the moving party, unless it appears that the new trial is granted upon the ground that the verdict is perverse, or is entirely unsupported by the evidence, or by reason of a misdirection of the jury as to the law.
3. An order coming within the class denominated "discretionary orders," there being no abuse of discretion, is not appealable, and the appeal therefrom should be dismissed.

APPEALS from an order of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Dismissed.*

Plaintiff is a corporation, with headquarters at Marsh-

field, engaged in the manufacture of lumber, and does a general lumbering business. Defendants were copartners owning and operating a box factory at Wausau. Plaintiff sets up four causes of action on contracts for the sale of lumber to defendants. It alleges delivery of a part of the lumber, and only part payment by defendants for that which was delivered. It claims damages resulting from defendants' breach of the contracts in refusing to accept the lumber delivered, and which it offered to deliver, under the contracts. Defendants deny breach of the contract, and allege their willingness to perform, and assert that the lumber offered them did not comply with the contracts. They claim that they were ready and willing to perform at all times until plaintiff refused to fulfill its obligations imposed by the agreements, and they therefore counterclaim on the ground of expense incurred in providing themselves with lumber in place of that purchased from plaintiff under the contracts, and further allege damages on account of the increase in the cost of the lumber purchased by them to make this substitution. They admit their indebtedness for some small sums. The case was tried before a jury, who found a verdict in plaintiff's favor, awarding damages for the sum of $5,204. After verdict there was a motion for a new trial on the grounds that the court erred in the admission and rejection of evidence; because of instructions given, and refusal to give instructions requested; "for the reason that the said verdict is contrary to law and against the weight of evidence;" and because the damages were excessive and against the evidence. The court granted a new trial upon condition that defendants pay the costs of the former trial. Both parties appealed. The defendants appeal from that part of the order taxing the costs against them as a condition of granting the new trial. Plaintiff appeals from the whole order.

For the plaintiff there were briefs by *Goggins & Brazeau* and *T. C. Ryan,* and oral argument by *Mr. Ryan.*

For the defendants there were briefs by *W. H. Mylrea,* attorney, and *Brown, Pradt & Genrich,* of counsel, and oral argument by *Neal Brown.*

SIEBECKER, J. This action is brought by plaintiff to recover damages for alleged breaches of contracts for the sale of lumber by it to defendants. The defendants deny liability, and counterclaim for damages; charging that plaintiff breached the agreements in failing to deliver the lumber as required under the contracts. The cause was tried before a jury, and plaintiff recovered a verdict assessing its damages against defendants at $5,204.

After verdict, and before entry of judgment, the defendants made a motion to set aside the verdict, and to grant a new trial in the case on the minutes, upon the ground that the court erred to their perjudice in ruling upon testimony, in giving certain instructions, and in refusing those requested by them, and because the verdict is contrary to law and against the great weight of the evidence. Counsel for defendants urged these various grounds upon the court, and requested that the court specify the grounds upon which a new trial was granted. The court granted a new trial, but did not specify in the order upon what ground it granted it. It appears, however, from the opinion of the court when a new trial was granted, that it did not base its action upon error committed in ruling upon questions of evidence, or in submitting the case to the jury. The court must therefore have concluded that the verdict in the case was contrary to the weight of the evidence. The granting of a new trial is within the discretionary power of the court, and is not to be reviewed on appeal unless the court has abused its discretion. Such motions are addressed to the court, in furtherance of justice, and the power is to be exercised in accord with the "usages or principles which courts have learned by experience will . . . best promote the ends of justice,

but it is still left to the courts to determine whether a case is exactly like, in every color, circumstance, and feature, to those upon which the usage or principle was founded, or in which it has been applied." *Platt v. Munroe,* 34 Barb. 291. The evidence in the case is voluminous and contradictory upon the vital issues litigated. The trial court had many opportunities and advantages for obtaining information as to the weight of the testimony and the credibility of the witnesses during the progress of the trial which this court is necessarily unable to obtain, but which it cannot ignore in attempting to review the discretionary acts of the court. In view of the conflict of the testimony, and the different inferences that might be drawn by different minds, variously affected as to the weight of the testimony and the credibility of the witnesses, we deem it unprofitable and unnecessary to review it at length, to express our opinion upon the evidentiary facts. The superior advantages possessed by the trial judge to aid him in this respect may, according to the dictates of his judgment, have led him to the conclusion that the verdict was against the justice of the cause, and that a due regard for the rights of the parties required that a new trial should be granted as requested. *Van Valkenburgh v. Hoskins,* 7 Wis. 496; *McLimans v. Lancaster,* 57 Wis. 297, 15 N. W. 194; *Evans v. Rugee,* 63 Wis. 31, 23 N. W. 24.

Upon the appeal of defendants from that portion of the order which requires them to pay the costs of trial as a condition of granting a new trial, this court has held that the general rule is that such terms should be imposed upon the moving party, unless it appears that the new trial is granted upon the grounds that the verdict is perverse or is entirely unsupported by the evidence, or by reason of a misdirection of the jury as to the law. *Schraer v. Stefan,* 80 Wis. 653, 50 N. W. 778; *Hoffman v. C., M. & St. P. R. Co.* 86 Wis. 471, 56 N. W. 1093. The order appealed from coming within the class denominated "discretionary orders," and there

being no abuse of the discretion, it is not appealable, and the appeal should be dismissed. *McElroy v. Minn. P. H. Co.* 109 Wis. 116, 85 N. W. 119.

Many other questions were discussed by counsel, upon the theory that the order granting a new trial was predicated upon error committed upon the trial, instead of being granted in the discretionary power of the court. Under the ruling, the case must be remanded for a new trial, at which the state of the case may differ so widely from the case now before us that a discussion of the questions argued would be of no aid or benefit.

By the Court.—Both appeals are dismissed.

THE STATE EX REL. HEWITT, Appellant, vs. GRAVES, Town Clerk, Respondent.

February 4—February 23, 1904.

Certiorari: *Proceedings to lay out highways: Jurisdiction: Failure to comply with statutes.*

A sufficient petition for a highway having been duly filed, the supervisors fixed May 15th as the time for deciding on the petition, and ordered notices of the hearing given. On that day the board met, decided that the notices had been properly posted and served as required by law, and made an order reciting such facts and ordered the highway laid out. The order was dated "May," and at some time was filed in the town clerk's office, but on what exact date it was signed or filed did not appear. No award of damages was ever made or filed on this order. Thereafter new notices of hearing of the same petition were ordered given for August 7th. On the last date an order laying out the highway together with an award of damages was duly made and filed. On *certiorari* to review such proceedings it was *held* that the supervisors lost jurisdiction by the failure to file the order and award of damages within ten days after May 15.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Kreutzer, Bird & Rosenberry,* and oral argument by *C. B. Bird.*

For the respondent there was a brief by *Brown, Pradt & Genrich,* and oral argument by *Neal Brown.*

WINSLOW, J. This is an appeal from a final judgment quashing a writ of *certiorari* upon the return. The action was brought to review the proceedings for laying out a highway in the town of Weston, Marathon county, and to reverse the order laying out the highway. The return showed, in brief, that a sufficient petition for the highway was filed in the town clerk's office April 17, 1903; that on May 1st following the town supervisors met, and fixed upon May 15th as the time for deciding on the petition, and ordered that notices of the hearing be given; that two members of the board met pursuant to the notice on May 15th, decided that notices had been properly posted and served as required by law, and made an order reciting this fact, and ordering that the highway be laid out as prayed, which order was dated May, 1903, and at some time was filed in the clerk's office, but on what exact date it was signed or when filed does not appear; that no award of damages was ever made or filed on this order; that on July 10th following new notices of hearing of the same petition were ordered given for July 24th; that on July 24th the board, deeming these notices defective, ordered new notices given for August 7th; that on August 7th an order was made and filed laying out the highway, and an award of damages was made and filed on the same day. The question presented is whether the supervisors had lost jurisdiction of the proceedings prior to the making of the order of August 7th, and the answer to this question depends upon the construction of our statutes governing the laying out of highways in towns. These statutes are not seriously com-

plicated, and their general purpose is evidently to provide a simple and effective proceeding by which necessary highways may be secured and the damages determined. The intent to make the proceeding expeditious is very plain, as well as a corresponding intent to relieve a property owner from more than one application during any one year. Thus the statutes provide for a petition signed by six freeholders (sec. 1265, Stats. 1898), for a notice of hearing of the petition to be posted and served (sec. 1267), for a hearing and decision according to the notice (if it appears that such notice has been properly given), and that adjournments of the hearing may be taken, not exceeding in all thirty days from the time of the first meeting (sec. 1268), for the making and signing of an order laying out the highway if such be the decision, and for the filing of such order together with an award of damages in the clerk's office within ten days after the day fixed for hearing or the last adjourned day, "and in case such supervisors shall fail to file such order and award within the ten days aforesaid, they shall be deemed to have decided against such application" (sec. 1269). Finally, in sec. 1283 it is provided that the determination of the supervisors in refusing to lay out a highway shall be final (unless appealed from) for one year thereafter, and no application for laying the same out shall be again acted on within said year. The proceeding is an adversary one, purely a creature of statute, and the statute must be strictly followed. Jurisdiction can only be obtained and retained by compliance with the requirements of the statute. If, after the due giving of a valid notice fixing the time for their first meeting, the supervisors do not make and file their decision and award of damages within the time required by sec. 1269, they lose all jurisdiction of the proceeding. *Ruhland v. Hazel Green,* 55 Wis. 664, 13 N. W. 877. The application of these principles to the instant case show that the judgment rendered below was erroneous. The return shows that no-

tice of hearing was ordered and given for May 15th, and that at that time the supervisors were satisfied that it had been properly served and posted. These facts being recited in the clerk's minutes, as well as in the order afterwards made by the supervisors, and there being no evidence of any kind to the contrary, they must be considered as conclusively established. What might be the result had the notices been insufficient, or not properly served or posted, we need not consider, because that case is not here. There can be no doubt that under the facts of this case jurisdiction was lost by the failure to file the order and award of damages within the time limited by sec. 1269. The longest time allowed by the statute for the purpose under any circumstances is forty days from the day fixed by the notice for deciding on the application (*Ruhland v. Hazel Green, supra*), and that time had passed long before the order of August 7th was made. When the time had expired, and no order and award had been filed, the statute stepped in and determined the fact that the application had been refused. It was as really and effectually refused as if a formal order of refusal had been filed, and under the terms of sec. 1283 it could not be acted upon again within the ensuing year. The order of August 7th should have been reversed.

By the Court.—Judgment reversed, and action remanded with directions to reverse the proceedings of the supervisors.

KAVANAUGH, Respondent, vs. CITY OF WAUSAU, Appellant.

February 5—February 23, 1904.

Municipal corporations: Committee of common council: Duties: Meetings: Validity of committee's action: Direction of verdict: Presumptions: Rebuttal: Ratification: Contracts: Warranty: Evidence of breach: Remoteness: Instructions to jury: Prejudicial error.

1. The duties of a committee of a common council appointed not only to buy a horse, but to pass upon the suitableness of the animal for the purpose for which it is intended, are more than merely ministerial in character.
2. In such case, the action of two members of a committee of three, in contracting for the horse without notice to their associate, or opportunity for him to participate in the matter, is invalid, and, in an action against the city for the purchase price for the horse, there being no evidence of subsequent ratification, a motion for a directed verdict should be granted.
3. Where the testimony was all one way, that two members of a committee of three met without previous notice or concurrence in the matter, and transacted the business of a committee without the other member knowing that any such transaction was in contemplation, a presumption of notice to the non-participating member of the committee, or consent by him to the act of his asociates, is completely rebutted.
4. In an action for the purchase price of a horse, alleged to have been purchased from plaintiff by two members of a committee of three appointed by a common council, without previous notice to or concurrence by the non-participating member, the disallowance of the claim by the council upon the report of the comptroller that the horse was not as represented, is not a ratification of the purchase, unless the council, when such action was taken, knew the facts rendering the purchase invalid.
5. Where the unsound condition of a horse at the time of purchase is vital to the defense of breach of warranty, it is error to exclude evidence, tending to show, that the same unsoundness existed nine months prior to the purchase and continuously thereafter down to the sale.
6. In such case, the evidence of the unsound condition at the early date cannot be said to be too remote.
7. Where a decision in plaintiff's favor depends largely on the weight to be given to his testimony, it is prejudicial error to

refuse a requested instruction, in substance, that in judging of the credibility of plaintiff's testimony, the jury may properly consider his interest in the result of the trial, the temptation under the circumstances to color his testimony favorably to himself, and everything bearing on the subject, and give such evidence such weight only as in their judgment it was entitled to, and that a like test should be applied to the evidence of each of the witnesses who testified in the case, unless such principle is embodied in the general charge.

8. **Such instruction does not invade the province of the jury, or violate the rule that, in instructions to the jury, the evidence of one witness should not be singled out and given prominence by special comment thereon.**

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Action to recover the purchase price of a horse alleged to have been sold and delivered to defendant by plaintiff, for $100. Plaintiff filed his claim with the city clerk, for action by defendant's common council. The claim was disallowed upon the report of the comptroller that the horse was not as represented. An appeal was then taken to the circuit court, where formal pleadings were filed. Plaintiff alleged a sale and delivery of the horse to the city at the agreed price of $100, the filing of his claim therefor, and the disallowance thereof as before stated. Defendant answered by general denial, and further that a committee of the council consisting of three members thereof was authorized to purchase a horse for the city; that two of them, without any notification to the other of a meeting to consider the matter, negotiated with the plaintiff for the purchase of the horse in question, and made such purchase so far as they had authority to do so, the other member of the committee not being consulted in the matter or having any notice of the proceeding; that they acted relying upon representations made by plaintiff that the horse was right in every way, that there was nothing the matter with him, and that he was a good animal for driving purposes; that soon after the animal was delivered the discovery

was made that he was afflicted with chronic rheumatism, tender feet, and diseased hoofs, and was totally unfit for driving purposes or for the purpose for which the purchase was made; and that thereupon it was returned to plaintiff, everything being done within the power of the city to do to rescind the transaction. Further facts were alleged in a separate defense showing a fraudulent warranty and breach thereof, and a rescission of the trade on that ground. A separate defense was stated to the effect that no valid contract between plaintiff and the city for the purchase of the horse was made.

Upon the trial the evidence was undisputed that a committee was empowered to buy a horse as alleged in the answer, and that two of such committee acted in the matter without any notification to the other of any meeting for that purpose, and without any participation by such other in the matter, as alleged. Also, that seasonably after the horse was delivered and the discovery made that he was infirm and not fit for driving purposes, it was returned to plaintiff as stated; also that the common council rejected plaintiff's claim upon the report of the comptroller that the horse was not as represented. There was no proof that the council knew at the time of such rejection the facts in regard to the arrangement having been made with plaintiff by two members of the committee only, without notice to their associate. There was evidence tending to prove the warranty pleaded, and of its fraudulent character; also that no meeting of the committee was called to take action in respect to the purchase of the horse, and that the arrangement was made with plaintiff at a casual meeting between him and two members of the committee.

Evidence of a competent witness was offered by defendant, to the effect that about nine months prior to the alleged sale the horse was afflicted with the infirmities charged in the complaint, proper questions in that regard being asked.

The evidence was ruled out upon the ground that the time was too remote, the court remarking that it "would not feel authorized to say because the mare had rheumatism in August that she had it the following May." Counsel for defendant then offered to prove the condition of the horse at the early date; that it was then afflicted with chronic rheumatism, and that its condition in that respect continued down to the time of the transaction in question. The evidence was ruled out as incompetent, immaterial and too remote.

At the close of the evidence defendant's counsel moved the court for a directed verdict, which was overruled. The case was submitted to the jury for determination on all the issues. The court refused to give an instruction requested by defendant's counsel to the effect that it was proper for the jury, in weighing plaintiff's evidence, to consider his interest in the result and all other circumstances bearing on his credibility, and that they should subject the testimony of each witness to a like test in determining its credibility and weight. The verdict was for the plaintiff. Judgment was rendered accordingly. Exceptions were duly taken to the rulings discussed in the opinion.

M. B. Rosenberry, for the appellant.

For the respondent there was a brief by *Brown, Pradt & Genrich,* and oral argument by *Neal Brown.*

MARSHALL, J. The motion of appellant's counsel for a verdict was based on the theory that the action of two members of the committee, in contracting for the horse without notice to their associate or opportunity for him to participate in the matter, was not valid. The motion was overruled on the theory that a committee of a governing body intrusted to do a particular thing of a public nature, though requiring the exercise of judgment, may act when a majority of its members are present and concur; and that when action is thus taken there is a conclusive presumption that all essen-

tials to the validity thereof have been duly complied with. We confess unfamiliarity with such a rule True, a committee may act by a majority of its members in such a case as the one in question, but only when all members have due opportunity to be present, and in the absence of evidence to the contrary, the presumption is that there was such opportunity; but the mere circumstance of such a majority action in the absence of the minority raises no conclusive presumption that such minority was duly notified and could have been present by making a reasonable effort to do so, or that such minority consented. There are authorities to the effect that such a committee, empowered to perform some mere ministerial duty, may act validly by concert of a majority regardless of notice to the minority; and some cases may be found—counsel for respondent discovered one of them—supporting the validity of the act of the majority of a committee in a matter requiring the exercise of judgment without opportunity for the minority to participate in the proceedings. But such authorities are rare. They are based on exceptional circumstances and probably in the main, if not universally, recognize the general rule to be that such a committee can act validly only by a majority vote when all the members are either present or have been notified and given opportunity to be present. In the case cited by counsel, *Gallup v. Tracy*, 25 Conn. 10, the court said:

"We make no question that the general principle of law is that public agents may act by majorities where all are present or when all have notice to be present, and generally not otherwise."

Many cases might be cited to the same effect, mostly quite ancient, since the rule is so elementary that it is rarely called in question with a sufficient degree of success to require a restatement of it in published decisions. We will refer to the following: *Downing v. Rugar*, 21 Wend. 178; *Grindley v. Barker*, 1 Bos. & Pull. 229; *Dobson v. Fussy*, 7 Bing. 305;

Green v. Miller, 6 Johns. 39; *Groton v. Hurlburt,* 22 Conn. 178; *Martin v. Lemon,* 26 Conn. 192; *Wilson v. Waltersville School Dist.* 46 Conn. 400; *Keeler v. Frost,* 22 Barb. 400; *Perry v. Tynen,* 22 Barb. 137; 1 Dillon, Mun. Corp. § 283 and note.

The gist of what the court said in *Perry v. Tynen,* as embodied in the syllabus, is in harmony with the language of all courts in speaking on the subject above discussed:

"In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—i. e., if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend."

That the duty which devolved upon the committee in question was other than merely ministerial in character, seems evident. They were required, not only to buy a horse, but to select a horse to be bought, passing upon the suitableness of the animal for the purposes for which it was intended.

The learned counsel for respondent seem to have labored industriously to discover support for the view entertained by the learned circuit judge, without success. The only authority cited to our attention applying any such view is *Gallup v. Tracy,* 25 Conn. 10, and that, as we have seen, does not support it. In *Wilson v. Waltersville School Dist. supra,* it is said that of the numerous decisions of the supreme court of Connecticut on the subject, *Gallup v. Tracy* stands alone in violating the common-law doctrine declared in *Martin v. Lemon.* Counsel lay great stress on *Downing v. Rugar,* 21 Wend. 178, but that, though an extreme case, goes no further than to hold that in circumstances like those before us the presumption that the absent member consented to the act of his associates should prevail in the absence of

testimony to the contrary. The testimony here is all one way that two members of the committee met without previous notice or concurrence in the matter, and made the trade without the other member of the committee knowing that any such transaction was in contemplation. In the face of that, the presumption of notice to the nonparticipating member of the committee, or consent by him to the act of his associates, is obviously most completely rebutted. The absent one could not have been notified of a meeting that was never called. He could not have consented to an action which was not official and of which he had no knowledge whatever. To hold in such circumstances that there is a conclusive presumption of concurrence by the absent member of the committee, as did the trial court, would open the door wide for the perpetration of fraud upon municipalities by committees of their governing bodies, which, in the very nature of things, must be entrusted with the performance of many duties of a discretionary character in business transactions. The ruling of the trial court was clearly wrong. The motion for a directed verdict should have been granted, at least unless there was some warrant for holding that the unauthorized act of the two members of the committee was subsequently ratified.

It does not appear from the judge's charge to the jury that the idea of ratification was indulged in upon the trial. The cause was rested solely upon the theory that if a majority of the committee agreed with respondent as to the purchase of the horse, that was sufficient on the question of whether a valid contract in that regard was made or not, irrespective of whether the third member of the committee had any opportunity to consider the matter. The learned judge, consistent with his decision on the motion to direct a verdict, so erroneously instructed the jury. No claim is now made of any ratification by the committee of the unauthorized transaction by the two members, but it is suggested that the dis-

allowance of the claim by the common council upon the report of the comptroller that the horse was not as represented, was in effect a ratification of the contract and rescission thereof. There would be much force in that if there was evidence showing that the common council, when such action was taken knew the facts rendering the transaction with respondent invalid. It is elementary that the infirmities as to the validity of a contract made by one ostensibly for and upon the authority of another must be known, actually or constructively, to such other, else his conduct in respect thereto cannot be construed as a ratification thereof. That rules this case on the subject in favor of appellant.

Complaint is made because of the exclusion of evidence regarding the condition of the horse some nine months prior to the transaction in question, upon the ground that the trial judge "would not feel authorized to say because the mare had rheumatism in August that she had it the following May." It seems that the learned judge fully appreciated that evidence of the condition of the horse as to soundness at the time of the trade was vital to the defense of breach of warranty, and that the evidence rejected was relevant unless the time involved was too remote. Whether such evidence was competent was a matter for the court to decide. Its determination could not be disturbed if reached legitimately, unless manifestly wrong. *Emery v. State,* 101 Wis. 627, 647, 78 N. W. 145. The question of competency respecting evidence is always one of law to be solved by the court, while the questions of the credibility and weight of evidence are matters of fact for the jury. If the test to be applied in determining the first question was whether the evidence, if true, would in the mind of the trial judge establish the fact in controversy, it is obvious that the court, in ruling thereon, would often be called upon to determine questions of credibility and weight. Such is not the test. If evidence, in the judgment of the trial court, if true, will tend within reason-

able probabilities to establish the matter in dispute according to the claim of the party offering it, and there is a reasonable probability of the truthfulness thereof, the true test of competency is satisfied and the evidence should be admitted. Best, Evidence (International ed.) § 132. The court's decision in such matter, following the proper test, is regarded as a verity unless manifestly wrong; but erroneous, of course, when an improper test is applied. The evidence as to the condition of the horse at some time prior to the alleged sale was competent if not so remote but that, within reasonable probabilities, it tended to show the animal's condition at the time of the sale. That was not passed upon by the trial judge in the ruling complained of. If it had been, and unfavorably to appellant, the decision might not appear so manifestly wrong as to warrant disturbing it. Evidence should have been produced in order to enable the trial judge to rule intelligently, tending to show that if the horse was affected with rheumatism at the early date that fact would tend to show that the manifestations at the time of or immediately after the alleged sale were attributable to the same cause. However, when appellant's counsel offered to show that the horse was afflicted with rheumatism at the early date and continuously thereafter down to the time of the sale, and was not permitted to do so, error was clearly committed of a most serious character. Such evidence not only tended to show that the horse was unsound to a degree rendering it unfit for the use intended by appellant, contrary to respondent's representations in that regard, but that he corruptly misrepresented the condition of the horse.

The instruction requested, to the effect that in judging of the credibility of plaintiff's evidence the jury might properly consider his interest in the result of the trial, the temptation under the circumstances to color his testimony favorably to himself, and everything bearing on the subject, and give such evidence such weight only as in their judgment it was

entitled to, and that a like test should be applied to evidence of each of the witnesses who testified in the case, was a correct statement of a legal principle. It was not only proper for the jury to consider the interest of plaintiff in the result of the trial, and every other circumstance appearing in the case reasonably calculated, in any view thereof, to throw light upon its credibility and weight, and to subject the evidence of each witness who testified to a like test, but it was their duty to do so; and the instruction might properly have been framed so as not to convey the idea to the jury that it was competent for them, in their discretion, to omit such test. The instruction being correct in principle applicable to the case—peculiarly so since a decision in respondent's favor depended largely upon the weight to be given to his evidence—and such principle not being in any respect embodied in the general charge, prejudicial error was committed in refusing it. Framed as it was, so as to indicate to the jury that the evidence of each witness should be subjected to the same test as the one applied to that of the plaintiff in determining the weight to be given thereto, it did not invade the province of the jury or violate the rule that the evidence of one witness should not be, in the instructions, singled out and given prominence by special comment thereon. *Chicago & A. R. Co. v. Anderson,* 166 Ill. 572, 46 N. E. 1125; *Pennsylvania Co. v. Versten,* 140 Ill. 637, 30 N. E. 540; *McDonell v. Rifle Boom Co.* 71 Mich. 61, 38 N. W. 681; *People v. Knapp,* 71 Cal. 1, 11 Pac. 793.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

STRASSER, Respondent, vs. GOLDBERG, Appellant.

February 5—February 23, 1904.

Replevin: Special verdict: Court and jury: Appeal: Affirmance and reversal: Evidence: Instructions to jury: Witnesses: Credibility: Damages.

1. Where, on a specific question submitted as part of a special verdict, the evidence is conflicting, it is not error to refuse to change the answer of the jury and for judgment in accordance with the requested change.
2. In an action of replevin the defendant claimed under a chattel mortgage executed by plaintiff's son, and introduced evidence to the effect that plaintiff herself represented that the property belonged to the son. This was contradicted by the plaintiff. The jury, in answer to specific questions of a special verdict, found that plaintiff did not knowingly permit the son to hold out or represent to the defendant, without objections on her part, that the son was the owner of the property, and that the defendant, at the time of taking the chattel mortgage, believed that the son owned the property and acted thereon. *Held*, that the special verdict was incomplete in that it contained no finding as to whether the plaintiff held out, declared, or admitted the property belonged to her son.
3. Such verdict is further incomplete in that it contained no finding as to whether plaintiff knew, or ought reasonably to have anticipated, that defendant might, in reliance on her statement, act to his injury, where there was evidence from which the jury might have drawn the inference that the plaintiff ought reasonably to have anticipated that defendant asked her a question as to the ownership of the property for some material purpose, and was likely to act in reliance upon the belief in the son's ownership.
4. In such case, it is error to refuse to permit defendant to testify that he did rely on plaintiff's statement as to the ownership of the property in taking his chattel mortgage. Defendant's mental process was a fact as to which his direct evidence was admissible, notwithstanding it might also be established or refuted by inferences from the circumstances and his conduct.
5. Defendant requested an instruction, which called attention to the interest of the plaintiff and the duty of the jury to consider such interest in passing on the credibility of her testimony, closing with the direction: "You are also to subject all the testimony of all the witnesses to the same test," which

was refused. The court gave general instructions that the interest of all witnesses was to be considered and whether such interest affected their testimony. *Held*, that while the requested instruction stated a correct rule of law, its refusal was proper, when it appeared that plaintiff was not the only interested witness, and the instruction might have erroneously impressed the jury to have discriminated her from the others. *Kavanaugh v. Wausau, ante*, p. 611, distinguished.

6. Where on the trial of a cause witnesses are contradicted, either by their own statements or by other testimony, and the court fails to give any instructions whatever upon the right of the jury to disregard the uncorroborated testimony of a witness whom they believe to have wilfully sworn falsely to any material matter, it is error to refuse a correct requested instruction as to the rule of *falsus in uno, falsus in omnibus*.

7. Where the plaintiff has taken possession of the property in dispute under a writ of replevin, and defendant claims the same by virtue of a chattel mortgage given by plaintiff's son under circumstances which may amount to an estoppel, it is error to exclude evidence as to the necessary expenses incurred by defendant in seizing and reclaiming the property after they had been transferred by the son to a purchaser, since, if the mortgage is valid against the plaintiff, such expenses might, by its terms, be realized out of the mortgaged property, and might affect the amount of defendant's recovery in event of the non-return of the replevied property.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Action of replevin for team of horses alleged by the complaint to be owned by the plaintiff, and wrongfully detained by the defendant. The answer denied all of the complaint except the detention by the defendant; alleged his possession to be by virtue of a chattel mortgage executed by John Strasser, son of the plaintiff, whom the answer alleged to have been the owner; but further alleged that for many years he had held himself out as owner, with the knowledge of the plaintiff, and with her permission; also that she, by direct statement and otherwise, had held him out as the owner before the making of the chattel mortgage; and that the defendant took the same relying on such conduct on her part.

It also alleged that after the making of the chattel mortgage the property was taken to another county by John Strasser, and there conveyed by bill of sale to third parties; that plaintiff, having knowledge of that fact and of defendant's claim to the property under the chattel mortgage, and that, relying upon such claim, he was about to incur expense in reclaiming the property from said grantee, and having full opportunity to notify him of her claim thereto, failed and neglected so to do, but permitted him, relying upon his chattel mortgage title, to incur necessary expense of $75 in reclaiming and bringing back the horses. By all such conduct defendant claimed plaintiff to be estopped to claim the property, or any part thereof. Evidence was offered at least tending to establish all the allegations of the answer. A special verdict was taken, all of the material questions except the second and third being answered by the court, to the effect that plaintiff, and not John Strasser, was the owner of the horses; that she had knowledge of the giving of the chattel mortgage about two months after its delivery, and of the seizure by the grantees in the bill of sale in Gates county, and that defendant was intending to reclaim the same under his mortgage—all before he did so. The second question, answered in the negative by the jury, was whether the plaintiff knowingly permitted John Strasser to hold out or represent to the defendant, without objection on her part, that he (John) was the owner of the team. The third question, answered in the affirmative by the jury, was whether the defendant at the time of taking the chattel mortgage, believed that John was the owner, and acted thereon. Defendant moved to change the answer to the second question from "No" to "Yes," and that upon the verdict so amended he have judgment; also that the verdict be set aside, and a new trial granted; both of which motions were refused, and judgment rendered in plaintiff's favor for possession and nominal damages, from which the defendant appeals.

For the appellant there was a brief by *Kreutzer, Bird & Rosenberry,* and oral argument by *M. B. Rosenberry.*

For the respondent there was a brief by *Brown, Pradt & Genrich,* and oral argument by *Neal Brown.*

DODGE, J. The first contention of appellant, to the effect that the court erred in refusing to change the answer to the second question of the special verdict from "No" to "Yes," and to thereupon render judgment in favor of the defendant, must be overruled. There is evidence on the part of the plaintiff in contradiction of any knowledge on her part of her son's conduct in holding himself out as the owner of the horses; hence the specific question whether she knowingly permitted him to do so was one for the jury.

In this connection appellant presses upon our attention certain testimony in the case to the effect that plaintiff herself represented the horses to belong to her son. This, however, is contradicted by her, and could not justify the court in deciding the fact. It, however, does support a further contention made, to the effect that the special verdict is incomplete in that it contains no finding as to whether she herself held out, declared, or admitted the horses to belong to her son John. The answer asserts not only the son's conduct with her knowledge, but also her own express representation, and the defendant testifies to such declaration. She denies it. The issue therefore was one squarely framed by the pleadings, and each side supported by evidence. Although she may not have known of her son's conduct, nevertheless she might be estopped by this conduct of her own, if under such circumstances that she ought reasonably to have anticipated that the defendant might rely and act thereon, and if he did so. It is the duty of the trial court to frame the special verdict, and to include therein every material issue raised by the pleadings and evidence. A judgment cannot be entered upon a verdict which fails to do this, if the omitted

issue might have been so resolved as to prevent such judgment. That is clearly the case here, and the judgment in favor of the plaintiff should not have been entered upon this defective verdict. *Orttel v. C., M. & St. P. R. Co.* 89 Wis. 127, 61 N. W. 289; *Hildman v. Phillips,* 106 Wis. 611, 82 N. W. 566. The only escape from the conclusion above stated would be upon a conclusive showing that plaintiff neither knew nor ought reasonably to have anticipated that defendant might, in reliance on her statement, act to his injury, or that he did not so act; or perhaps upon an entire absence of evidence of either such facts. The latter—namely, the acting by defendant—is perhaps, though ambiguously, found by the jury in answering question 3, but as to the former of these facts the verdict is silent, and therefore further defective, if there was any evidence upon it to support different conclusions. That there was such evidence we are persuaded. Defendant was notoriously in the business of buying and selling horses. He and a customer, according to some testimony, made a special trip to plaintiff's farm, and asked if she had any horses to sell, to which she answered in the negative, whereupon he asked to whom the team in question belonged, and she replied that it belonged to her son John. From this, if they believed it, a jury might have drawn the inference that she ought reasonably to have anticipated that defendant asked the question for some material purpose, and was likely to act in reliance upon belief in John's ownership. *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440.

In this immediate connection we may mention an assignment of error predicated upon the court's refusal to permit defendant to testify that he did rely on this statement in taking his chattel mortgage. Such ruling was clearly erroneous. Defendant's mental process was a fact as to which his direct evidence was admissible. *Curran v. A. H. Stange Co.* 98 Wis. 598, 607, 74 N. W. 377; *Yerkes v. N. P. R. Co.* 112 Wis. 184, 195, 88 N. W. 33. It was also a fact as to which

the burden of proof rested on him. *Simonsen v. Stachlewicz,* 82 Wis. 338, 52 N. W. 310; *Mygatt v. Tarbell,* 85 Wis. 457, 467, 55 N. W. 1031. It, of course, might also be established or refuted by inference from the circumstances and conduct themselves (*Vilas v. Mason,* 25 Wis. 310, 324), but direct evidence could not thereby be rendered inadmissible.

An instruction was requested by defendant, and refused, which, with much detail, called attention to the interest of the plaintiff and the duty of the jury to consider such interest in passing on the credibility of her testimony; such instruction closing with the direction, "You are also to subject all the testimony of all the witnesses to the same test." The court gave a general instruction that the interest of all witnesses in the controversy was to be considered and whether such interest affected their testimony. While the instruction so requested states a correct rule of law, we nevertheless think its refusal proper under the circumstances. The plaintiff was not the only interested witness, and it might well have erroneously impressed the jury to have discriminated her from the others. This, as has often been said, is a field fraught with danger. The court properly and wisely made no discrimination between the different witnesses, but informed the jury of their duty to consider the interest of each as bearing upon his or her credibility. The situation is distinguishable from that in *Kavanaugh v. Wausau, ante,* p. 611, 98 N. W. 551, where there was no other interested witness than the one mentioned in the requested instruction, and where the court failed to give any charge as to the effect of interest upon the credibility of witnesses.

There was also requested by the defendant, and refused, an entirely correct instruction as to the rule of *"falsus in uno, falsus in omnibus."* Some of the plaintiff's witnesses were so contradicted, either by their own statement or by other testimony, that the field was open for the application

of this rule. The court not only refused the instruction requested, but failed to give any whatever upon the right of the jury to disregard the uncorroborated testimony of a witness whom they believed to have wilfully sworn falsely to any material matter. In this there was error. Upon a trial presenting such a situation it is the duty of the trial court to inform the jury as to this rule. A breach of that duty may not be reversible error in the absence of specific request, but when, in such a case, request is made and refused, error is committed, which, in the present situation, appears to us to have been prejudicial.

The remaining assignment of error is upon the exclusion of evidence as to the necessary expenses incurred by defendant in seizing and reclaiming the horses after they had been taken to Gates county and transferred by John Strasser to a purchaser there. The evidence was clearly admissible. If the mortgage is valid against the plaintiff, any necessary expenses incurred by defendant may, by virtue of its terms, be realized out of the mortgaged property, and might well affect the extent of defendant's interest therein, and therefore the amount of his recovery of damages in event of nonreturn of the replevied property now in plaintiff's possession.

We find no other assignments of error necessary of discussion. For the reasons already stated, a new trial is unavoidable.

By the Court.—Judgment reversed, and cause remanded for a new trial.

DRINKWINE and others, Respondents, vs. GRUELLE and wife, Appellants.

February 5—February 23, 1904.

Witnesses: Adverse examination: Transactions with person since deceased: Competency: Deeds: Mortgages: Setting aside: Undue influence: Evidence.

1. A father gave a mortgage to his son-in-law and afterwards the father delivered to him a deed of the same premises and the son-in-law satisfied the mortgage. In an action by children, after the father's death, to set aside the mortgage and deed because obtained by fraud and undue influence, the plaintiffs examined the son-in-law as an adverse party, under the authority of sec. 4068, Stats. 1898, as to the execution of the two instruments, and called out testimony, to the effect that the only consideration paid therefor was the support and care of the father for the last five or six years of his life, his doctor bills, funeral expenses and $15 in money. *Held*, that the plaintiffs thereby, under sec. 4069 (precluding a party from testifying as to transactions and communications with persons since deceased, except under certain situations), opened the door for the admission of testimony of defendants as to the exact consideration for the instruments.
2. Influence or importunity, to be undue, must destroy, or at least impair or prevent, free agency.
3. In an action to set aside a deed and mortgage alleged to have been obtained by fraud and undue influence, the evidence examined, and *held* not to sustain findings of undue influence.
4. In such cases, the judgment is not to rest on mere suspicion or assumption, or on findings that rest largely upon the existence of ill feeling and opportunity to stimulate ill feeling.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

It appears from the record, and is, in effect, found by the court, that Larry Drinkwine, Sr., died intestate November 13, 1901, at the age of eighty-one, leaving, him surviving, five children, the youngest of which was thirty years of age. The three sons and the youngest daughter commenced this action March 3, 1902, against the other daughter, *Villa,*

and her husband, *Otto Gruelle,* to concel and set aside a mortgage executed by the deceased to the defendant *Otto* April 10, 1897, on eighty acres of land then owned by him, and upon which he and the defendants then resided, and which mortgage purported to secure the payment of $3,000, according to the terms of a promissory note for that amount, and was recorded April 12, 1897; and also to cancel and set aside a warranty deed of the same land to the defendant *Otto,* executed by the deceased February 18, 1901, and reciting a consideration of $1, and purporting to be given in satisfaction of the mortgage, and which deed was recorded February 19, 1901, and to have the title to said real estate adjudged to be in the four plaintiffs and the defendant *Villa* share and share alike, to each an undivided one fifth interest thereof, on the ground that the mortgage and deed were respectively procured by the fraud and undue influence of the defendants on the deceased when he was weak and feeble in mind and body. The defendants answered by way of admissions, denials, and counter allegations. At the close of the trial the court found as matters of fact, in effect, in addition to the facts stated, that the deceased was during his whole life illiterate, and unable to read or write; that at the time of his death and for five years prior thereto he had been eccentric, childish, easily influenced, became angry at trifles, was excitable, of strong prejudices, his faculties (eyesight and hearing) somewhat impaired, and had transacted no business except as stated; that his wife died in September, 1896; that at that time his son *George,* who was then unmarried, had been living with him and working the farm for eleven years after he became of age; that during that time his father gave him a deed of the farm, which was never recorded, and which he returned to his father to keep for him, but never got it afterwards; that when his mother died, in September, 1896, *George* left the farm, and the defendants moved onto the place, and the deceased made his home

with them; that thereupon the deceased became cold and unfriendly toward the plaintiffs, and ceased to counsel with them; that the mortgage and deed were each given without consideration, and by undue persuasion, importunity, and influence exercised by the defendants over the deceased; that some time between the giving of the mortgage and the deed the deceased executed to the defendant *Otto* a bill of sale of his personal property; that during the five years before he died the deceased drew a pension from the United States of $12 per month; that the defendants fraudulently concealed from the plaintiffs and others the real transactions in obtaining the bill of sale and deed by falsely and fraudulently claiming to have paid full value for the same in cash; that during the five years the deceased lived with the defendants they in some manner prejudiced him against *George* by convincing him that *George* had forged his name to a note for $700, and prejudiced him against the plaintiff *Viola* by convincing him that she was not lawfully married to the man with whom she was living. And as conclusions of law the court found, in effect, that the plaintiffs were entitled to the relief demanded in the complaint; that the mortgage and deed were procured by the defendants through their fraud and undue influence practiced upon the deceased during his lifetime, and should be canceled and set aside; that the defendants and all persons claiming under them since the filing of the notice of the pendency of this action be forever barred against having or claiming any right or title to the lands described adverse to the plaintiffs, except as to such interest therein as the defendant *Villa* may have inherited as one of the heirs of the deceased; that the plaintiffs are entitled to their costs in the action, and ordered judgment to be entered accordingly. From the judgment so entered the defendants bring this appeal.

For the appellants there was a brief by *Sturdevant & Clark,* and oral argument by *L. M. Sturdevant.*

For the respondents there was a brief by *J. R. & C. R. Sturdevant* and *S. M. Marsh,* and oral argument by *C. R. Sturdevant.*

CASSODAY, C. J. It is evident that the intestate was an eccentric man, with peculiarities of temper, disposition, and habits. He was easily excited, and became angry at trifles, and was strong in his prejudices, and set in his notions. His qualities of head and heart were necessarily known to his children, as indicated by their intercourse at times and want of intercourse at other times. But the trial court held, and counsel concede, that there is no evidence "of such mental unsoundness as would warrant the court in finding that the deceased was incapable of executing the instruments in question." Having the mental capacity to execute the mortgage and deed in question, it must be conceded that the intestate had the legal right of his own free will to convey his farm to whomsoever he pleased, regardless of the moral obligations which parents ordinarily feel toward all their children. It may be questionable whether the intestate was ever impressed with any such moral obligations. Years before his wife died he had voluntarily conveyed the farm to his son *George,* with no expectation of receiving anything in return except care and support. *George* was unmarried, and about thirty-five years of age, when his mother died. Upon the death of his mother he and his father were left alone on the farm. Manifestly, his experience had been such that he did not wish to remain longer on the farm. Years before he had received a deed of the farm from his father, and returned it to him to keep for him, and never asked for it nor received it afterwards. The intestate was seventy-six years of age when his wife died, and the next day after her funeral he asked his eldest son, *Larry, Jr.,* what would be the best thing for him to do in view of the fact that he had nobody to keep house for him; and *Larry* told him that he "thought the best thing

he could do was to get *Otto* to stay on the place, and he could work the place—rent it or work it any way to his satisfaction," and that then was the time to make the arrangement with *Otto* and *Villa,* who were present; and the intestate then said that he would like to have *Otto* and *Villa* stay with him, and keep house, and do the work, and that, if they did, at least for the winter, he would pay them what was right; and an arrangement was then made, and the defendants then moved upon the place, and they remained there until he died. The intestate had but two daughters, and it was natural that he would want to live with one of them. About seven months after the death of the wife the intestate gave to *Otto* the mortgage in question, and nearly four years after that he gave to him the deed in question. The precise consideration of the mortgage and deed in question does not appear. The offer of the testimony of the defendants tending to show such consideration, or the agreement upon which such mortgage and deed were given; was excluded by the court on the ground that it called for transactions between them and the deceased within the meaning of sec. 4069, Stats. 1898. And yet the plaintiffs had previously called the defendants, and examined them as adverse parties, under sec. 4068, as to the giving of the mortgage and the deed by the deceased to the defendant *Otto;* that the only consideration paid therefor was the support and care of the old man for the last five or six years of his life and his doctor's bills and funeral expenses and $15 in money; that the defendants went with the deceased to town at the time the mortgage was executed, and also at the time the deed was executed; that *Otto* received a transfer of the personal property before he received the deed; and that in consideration of the mortgage the defendants were to support and care for the deceased during the last five years of his life. We are constrained to hold that by such adverse examination the plaintiffs, under the statutes cited, opened the door for the admission of the testimony of the defend-

ants offered, tending to prove that the consideration for the mortgage was an agreement on the part of the defendants to support and take care of the deceased during the remainder of his life—provide food and necessary clothing, medical attendance, and a decent burial; and that a similar agreement was the consideration for giving the deed; and that the exclusion of such testimony was error.

To sustain this judgment it is necessary to hold, as the trial court did hold, that the deceased was induced to execute the mortgage and the deed by the undue influence of the defendants over him, It is certain that the defendants moved onto the place at the request of the deceased, and rendered services, care, and support for him for more than five years, while the other children rarely visited him. The conduct of the defendants may, in part, account for their absence, but the fact nevertheless remains. The deceased was certainly under some obligations to the defendants for such services, care, and support. Influence or importunity, to be undue, must destroy, or at least impair or prevent, free agency. Even in the case of the execution of wills, where the testator is not supposed to be under any legal obligation, this court held many years ago:

"Undue influence in such a case is such an influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person. Motives of natural affection and gratitude on the part of the testator, and solicitations or arguments which appeal to such motives, do not constitute undue influence." *In re Jackman's Will,* 26 Wis. 104, 111–114; *Deck v. Deck,* 106 Wis. 470, 472, 473, 82 N. W. 293.

It sufficiently appears that the deceased was in the habit of exhibiting his free agency on numerous occasions. He was repeatedly angry at the defendant *Otto.* On one or two occasions he went so far as to take an ax at him. It manifestly required tact and skill and patience to get along with him.

The deed was executed about nine months prior to his death, the immediate cause of which was pneumonia. The man who drew the deed testified to the effect that the deceased came to his office alone, and asked him if he was a notary public, or could make a deed; that he told him he could; that he then said he wanted to make a deed to the defendant *Otto*; that he then went out, and said he would be back in a few minutes; that he soon returned with the defendant *Otto*, and said he was ready to make the deed, and gave to the notary the instructions concerning the deed; that the notary wrote the deed for him, and asked him if there was a mortgage on the place, and he said there was, and he was giving the deed to satisfy the mortgage, and he thought it was so stated in the deed; that one of the two persons who subscribed the deed as witnesses wanted to know what the paper was; that the notary then read the deed over a second time before it was signed, and asked the deceased if that was his own free will, and he said it was; that he then asked him if he had been coaxed into it, and he said he had not; that the deceased seemed to understand it perfectly; that the defendant *Otto* was in the room, but said nothing. Neither of the subscribing witnesses to that deed were examined or called. The undisputed evidence as to the facts and circumstances attending the making of that deed preclude any inference that the deceased was induced to execute the same by fraud or undue influence. Besides, the deed had been on record for nearly nine months when the intestate died, and the mortgage had then been on record for four years and seven months. The deceased frequently, and for years, had stated that the place belonged to *Otto*. The plaintiffs, or at least three of them, knew for years prior to their father's death that the defendants claimed to own the place. The only pretense of concealment is that the defendants, or one of them, stated to the plaintiffs and others that they had bought the place, and paid $3,000 in cash for it, which they had bor-

rowed. That they so stated that they paid in cash, however, is denied. There is evidence to the effect that the deceased made similar statements. At the time the mortgage was given the value of the place appears to have been about the amount stated in the mortgage. In view of the strained relations of some of the parties, it is not very significant whether such statements were made or not. Their bearing upon the question of undue influence is, at most, remote. The same is true as to the story about *George* having forged a note, and *Viola* not having been lawfully married. There is no pretense of the deceased having been prejudiced against the plaintiffs *Larry, Jr.,* or *John.* None of the plaintiffs appear to have questioned their father in respect to his having given the mortgage or the deed. We fail to find evidence sufficient to support the findings of undue influence. Such findings seem to rest largely upon the existence of ill feeling and opportunity to stimulate ill feeling. But judgments, in such cases, are not to rest upon mere suspicion and assumption. The case differs broadly in its facts from those relied upon to support the judgment. See *Disch v. Timm,* 101 Wis. 179, 191, 192, 77 N. W. 196, and cases there cited. The principles of law applicable to the facts in this case are sufficiently covered by recent adjudications of this court. *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921; *Deck v. Deck,* 106 Wis. 470, 82 N. W. 293; *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215; *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939. We must hold that the findings of undue influence are not sustained by the evidence.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

WILSON, Administratrix, Appellant, vs. CHIPPEWA VALLEY ELECTRIC RAILROAD COMPANY, Respondent.

February 5—February 23, 1904.

Interurban railroads: Negligence: Wanton and wilful injury at highway crossing: Court and jury: Evidence: Direction of verdict: Pleading: Cause of action.

1. In an action against an electric railroad company operating an interurban line, for the negligent killing of plaintiff's intestate in a collision with a runaway team at a highway crossing, the complaint charged that the defendant's agents wantonly and wilfully ran the deceased down, with such gross negligence as to amount to an intention on their part to inflict injury to the deceased. The action was tried on the theory that these facts must be shown. *Held*, on the evidence, stated in the opinion, that the case presented was one for the jury, and that the direction of a verdict for defendant was erroneous.
2. In an action for personal injuries charged to have been committed in such a wanton and wilful manner as to amount to an intention to inflict the injuries, there can be no recovery on testimony showing a want of ordinary care, even though gross negligence or intentional wrong is not proven.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

At 4 o'clock p. m. on the 14th day of December, 1901, one David Wilson, while crossing the defendant's track in a sleigh drawn by two horses, was run down and killed by one of defendant's electric cars, and this action is brought by his widow and administratrix to recover damages for his death. The complaint charges gross negligence, or, more accurately, such wilful and wanton acts as amount to intentional killing. A verdict for the defendant was directed at the close of the evidence, and the plaintiff appeals from judgment thereon.

The evidence showed that the place where the accident took place was a highway crossing known as "Smith's Crossing." Though within the city limits of Eau Claire, it was so far on the outskirts as to be practically a country crossing.

At this point the defendant's track runs northeast and southwest; the same being an interurban line between the cities of Eau Claire and Chippewa Falls, over which the defendant operated cars at stated intervals. The track was upon a fenced right of way, and both track and right of way were in all essential respects maintained like those of the ordinary railroad. Immediately adjoining and parallel to the right of way upon the southeast was the right of way and track of what is commonly called the "Omaha Railway," and immediately adjoining this, again, was the track and right of way of the Wisconsin Central Railway; the track of the Omaha Road being ninety-six feet from the defendant's track, and the track of the Central being 137 feet from the Omaha track. The highway on which the deceased was driving ran directly east and west, crossing all three of the tracks at grade. The car which ran down the plaintiff was approaching the crossing from the northeast, and was an interurban car, going at from twenty to twenty-five miles per hour. The deceased, with one Howard, was approaching the crossing from the east. The day was cold, and both men were well muffled up. The horses were owned by the deceased, and were young and high-spirited, and had run away at least twice before; the last time being on the day of the accident. It appears that, from the time when a traveler approaching the tracks from the east reaches a point 150 feet east from the defendant's track up to the time when he crosses the track, he has an unobstructed view to the north, and can see a car approaching for more than a mile, and can, of course, himself be seen from the car. The plaintiff introduced evidence tending to show that the team which the deceased was driving got beyond his control and commenced to run away just before reaching the Wisconsin Central track, at a point about 313 feet east of the crossing over the defendant's track, and that they continued running away till they crossed the defendant's track; that at the time they commenced to run,

or when first seen running, the defendant's car was about 350 feet north of the crossing; that the defendant's motorman saw Wilson's team approaching, and made no attempt to stop his car until after it had struck the sleigh in which the deceased was riding. On the other hand, the defendant's evidence tended to show that the team did not commence to run until it passed the Omaha track, and that the motorman attempted to stop the car when he saw the team commence to run. It was undisputed that the car struck the sleigh, throwing one of the men a distance of thirty-seven feet, and the other a distance of fifty-three feet, killing them both, and that the car ran several hundred feet beyond the crossing before stopping.

For the appellant there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

For the respondent there was a brief by *Frawley, Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

WINSLOW, J. The complaint charges that the defendant's agents wantonly and wilfully ran the deceased down, with such gross negligence as to amount to an intention on their part to inflict injury on the deceased. The action was tried on the theory that these facts must be shown. The trial court directed a verdict because it deemed that there was no credible evidence tending to show such facts, and the question now presented is whether this direction was right. We are convinced that this question must be answered in the negative. There were ten or more passengers in the car as it approached the place of accident. It is admitted that it was running at a speed of from twenty to twenty-five miles an hour. It is an unquestioned fact that, as the car approached the crossing from the northeast, the deceased, in his sleigh, was approaching the crossing from the east, and that both car and sleigh reached the crossing at the same instant of time, and that at that time the speed of the car had

been only slightly diminished, if diminished at all. It is admitted also by the motorman that he saw the team of the deceased coming from the east just as it approached the Wisconsin Central track, being something over 230 feet from the crossing in question, though he says they were then trotting, and did not commence to run until they had crossed the Omaha track, when he at once shut off the current, set the brake, and put on the reverse current. Doubtless, if the evidence stopped here, we should be obliged to affirm the ruling of the trial court, for it could not be said from these facts that there was anything which showed either intentional injury on the part of the motorman, or that degree of reckless disregard of consequences indicating a willingness to injure which is equivalent in the law to an intent to injure. A motorman is not obliged to check his speed or stop his car every time he sees a team approaching which is under control. *Eastwood v. La Crosse C. R. Co.* 94 Wis. 163, 68 N. W. 651. But there is other testimony in the case which must be considered. A young man named Peck was one of the passengers on the car, and was sitting toward the rear end, on the east side. He testifies that as the car approached the crossing, and was about 350 feet distant therefrom, he looked over his shoulder out of the window of the car, and saw the deceased and his team at a point just opposite the bicycle arch (a structure on the south side of the highway), being by measurement eighty feet east of the Central crossing, and 313 feet east of the defendant's crossing; that the team was then frightened, and running west toward the crossing; that everything indicated that they were running away; they were running too fast to be running for the fun of it; that he (witness) got right up and started for the front end of the car; that he looked at the motorman as he was walking to the front, but the motorman made no effort to stop the car; that, as he got to the front end of the car, he looked out again at the team, and they were just coming over the Omaha

track, still running; that he turned, and looked at the motorman again, and he was doing nothing to stop the car; then in an instant came the collision, and he looked out of the window on the other side of the car, and saw the team running down the street with the pole and whiffletrees alone. There was evidence by other witnesses to the effect that the motorman did nothing to stop the car until almost the moment of collision, or the moment after the collision. If these were indeed the facts, they furnish ample basis for the conclusion that the motorman was guilty of a gross and wanton recklessness in operating his car, which amounted to an utter disregard of human life and limb, and thus was within the rule of gross negligence, as recently laid down in the case of *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446. The motorman admits that he actually saw the team just as they were coming onto the Central track, about 230 feet east of the fatal crossing, but he also testifies that they were then under control. It certainly will be admitted by all that if the motorman in charge of an electric car going at a high rate of speed sees a runaway team approaching a crossing under such circumstances as must suggest to any mind that a collision is probable, and makes no effort to control or stop his car, but allows it to run down the team and driver, he is guilty of that wanton and reckless disregard of human life which amounts in the law to intentional wrong. On this proposition there is no room for two opinions.

It seems to have been the idea of the trial court in this case that because the witness Peck admittedly did not see the team from the point 313 feet east of the crossing until it reached the Omaha crossing (a distance of 217 feet), and because another witness testified that he saw the team between these points, and that they were not running, but going at a trot, the fact that the team was running away at any point during the progress of the 217 feet is disproven. We cannot agree with this contention. If Peck's story is to be believed

(and his testimony is certainly not intrinsically incredible, nor is it conclusively disproven), then the facts were that both team and car were approaching this crossing at about the same speed, namely, between twenty and twenty-five miles an hour; that when the team was 313 feet distant it was running away; that when ninety-six feet distant it was running away; that it reached the crossing at the identical moment that the car reached the crossing. These facts certainly would justify the inference that the team was running away during the whole 313 feet, because it must have kept up its speed, and testimony that it was walking or only slowly trotting for a part of the time would not necessarily overcome the inference. So we arrive at the conclusion that the case was one for the jury, and that the direction of a verdict for the defendant was erroneous.

Another contention made by the plaintiff is that in any event there was testimony in the case showing a want of ordinary care on the part of the motorman, and that there might be a recovery on this ground, even though gross negligence or intentional wrong was not proven. It is true that some courts have held that, notwithstanding gross negligence is charged, there may be a recovery on the ground of want of ordinary care only. *Keating v. D., B. C. & A. R. Co.* 104 Mich. 418, 62 N. W. 575; *Hays v. G. St. R. Co.* 70 Tex. 602, 8 S. W. 491; *Claxton's Adm'r v. L. & B. S. R. Co.* 13 Bush, 636; *Rockford, R. I. & St. L. R. Co. v. Phillips,* 66 Ill. 548. On the other hand, a number of courts have arrived at the opposite conclusion. *Highland Ave. & B. R. Co. v. Winn,* 93 Ala. 306, 9 South. 509; *Louisville, N. A. & C. R. Co. v. Bryan,* 107 Ind. 51, 7 N. E. 807. This court has held that, where the complaint simply charges negligence or want of ordinary care, there can be no recovery on the ground of wilful injury, or that reckless and wanton disregard of another's rights equivalent to wilful injury, which has been termed "gross negligence," because this is a different cause

of action. *McClellan v. C. V. E. R. Co.* 110 Wis. 326, 85 N. W. 1018. Is the converse of the proposition true? We think it must logically be so held. In the case of *Bolin v. C., St. P., M. & O. R. Co. supra,* this court very carefully examined the doctrine of gross negligence, and reviewed the authorities on the subject. The conclusion there reached was that there had been inaccuracy at times in the decisions in the use of the term "gross negligence;" that whenever negligence, properly so called, was the foundation of the action, contributory negligence on the part of the plaintiff would defeat a recovery, no matter how great the negligence of the defendant; that, in order to constitute "gross negligence," as it has been called (i. e., that degree of misconduct for which a recovery may be had notwithstanding contributory negligence), there must be charged and shown either a wilful intent to injure, or that reckless and wanton disregard of another's rights and safety, and that willingness to inflict injury, which the law deems equivalent to an intent to injure. It was shown that in a wrong of this nature there is really no element of inadvertence, which is a necessary element of negligence, and hence that the term "gross negligence," as applicable to this class of wrongs, is inaccurate. The conclusion is that when this kind of a wrong is charged, as in the present case, though it be called "gross negligence," it does not logically include ordinary negligence, any more than a charge of ordinary negligence includes intentional wrong, and hence the appellant's contention in this regard must fail.

It is not deemed necessary to discuss any other questions.

By the Court.—Judgment reversed, and action remanded for a new trial.

SCHRAMEK, Appellant, vs. SHEPECK, Administrator, Respondent.

January 15—March 22, 1904.

Guardian and ward: Care of incompetent by volunteer: Recovery.

Where a guardian had contracted for the care of his incompetent ward, a mere volunteer who assisted in the care of the ward without the authority or knowledge of the guardian cannot recover for such services on the ground that they were necessaries.

APPEAL from a judgment of the circuit court for Brown county: SAMUEL D. HASTINGS, Circuit Judge. *Affirmed.*

The plaintiff filed a claim amounting to $640 in the county court against the estate of John Zalinka, deceased, for personal services. The claim being disallowed in the county court, the plaintiff appealed to the circuit court, where a jury trial was had. The evidence showed that prior to March 26, 1900, the defendant, *Shepeck,* was the duly appointed general guardian to one John Zalinka, who was then over eighty years of age, and mentally incompetent and physically very weak; that on March 26, 1900, *Shepeck,* as such guardian, placed Zalinka to live with one Joseph Straka, in Green Bay, under an express contract for his board. *Shepeck* testifies that this contract was that he was to pay $20 per month in full for the board and the care of Zalinka, while Straka testifies that he agreed that he would take Zalinka and board and look after him for that sum. It further appears that from March 26, 1900, up to December 31, 1901, being the date of Zalinka's death, he remained in Straka's house, and was boarded and cared for there, and that Straka received $20 per month therefor, and gave monthly receipts for the money, in which the $20 was stated as being for board and care; that the plaintiff was a nephew of Zalinka, and the partner of Straka in a small button man-

ufacturing business, and boarded with Straka during the whole time; that Zalinka was so feeble as to be unable to dress or feed himself or attend to the calls of nature, and that the plaintiff (except during four or five absences from Green Bay) daily assisted Zalinka in these respects; and for these services, at $1 per day, this claim is made. It appears further that the board alone was not worth to exceed $3.50 per week; that the plaintiff knew this fact, and also knew that Straka was getting from *Shepeck* $20 a month; that neither Straka nor *Shepeck* ever asked *Schramek* to render any of the services for which he claims pay, and that the plaintiff never informed *Shepeck* that he was doing the services, or asked him for any pay therefor; that, when the plaintiff was away from home, Straka and his family attended to the personal services for which the plaintiff claims pay. At the close of the evidence a verdict for the defendant was directed, and from judgment thereon the plaintiff appeals.

V. I. Minahan, for the appellant.

For the respondent there was a brief by *Sheridan & Evans* and *A. P. Schenian,* and oral argument by *W. L. Evans.*

The following opinion was filed February 2, 1904:

WINSLOW, J. The evidence shows that there was no contract, either express or implied, made by *Shepeck,* the guardian, to pay for the services performed by the plaintiff; and, as Zalinka was incompetent and under guardianship, there could be no contract made by him. Hence there can be no recovery unless the services can be called necessaries. Sec. 3979, Stats. 1898. Doubtless it was necessary that the ward should have the personal attentions which the plaintiff gave him, but, if the guardian had made provisions for the wants of the ward in this respect, a mere volunteer, who assumed to perform the services without the authority or knowledge

of the guardian, cannot recover for them. It appears without dispute in this case that the guardian had contracted with Straka for the board and care of the incompetent ward and that he knew nothing of the supposed services rendered by *Schramek,* hence there can be no recovery for such services even on the ground that they were necessaries. *Gwaltney v. Cannon,* 31 Ind. 227; *McKanna v. Merry,* 61 Ill. 177.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied March 22, 1904.

ELLIS, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

February 23—March 22, 1904.

Railroads: Negligence: Injury to passenger alighting from train: Improper place to stop: Evidence: Setting aside verdict: Appeal: New trial.

1. It is actionable negligence for a railway company to stop a train in the nighttime in such a position with reference to the depot platform that passengers alighting, especially women, are compelled to step down, without any intermediate rest, without sufficient light to enable them to observe their surroundings, and without assistance, from the lower step of the car to the surface of the ground, a distance so great as to imperil personal safety.
2. In an action for injuries alleged to have been sustained under such circumstances, the evidence being conflicting and there being no fact within common knowledge and no undisputed fact rendering entirely unworthy of belief the plaintiff's testimony that she did not leave her seat to alight from the car until the train had stopped, it was error for the trial court to set aside a special finding by the jury in accordance with such testimony and to dismiss the complaint on the ground that plaintiff left the train while it was still in motion.

3. **Where the facts found in a special verdict entitle the plaintiff to judgment but the trial court, by a misapplication of legal principles to the evidence, set aside the verdict and gave judgment for defendant, the supreme court, on reversing that judgment, will direct a judgment for plaintiff without a new trial.**

APPEAL from a judgment and order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Action for damages for personal injuries. The charge in the complaint is to this effect: August 29, 1902, plaintiff was a traveler on one of defendant's regular passenger trains due from the north at Corliss at about 8 o'clock p. m., where she purposed changing cars for Racine. The night was dark. As the train neared the station one of defendant's servants announced the fact and opened the vestibule door of the car in which plaintiff was riding, in order to enable passengers therein to alight. When the car stopped the opening thus provided was not at the platform nor where there was a light to enable passengers to conveniently and safely alight. Plaintiff proceeded to leave the car, not appreciating the situation. It was about three feet from the lower step of the car to the ground. The ground was rough and stony. As she stepped off the car, miscalculating the distance to the ground, she lost her balance and fell upon the stony surface aforesaid, severely injuring her.

The answer put in issue all allegations of the complaint respecting negligent conduct on the part of defendant's servants.

There was evidence on plaintiff's part sustaining the allegations of her complaint as to there being no platform where she left the train, no light to enable her to see the surroundings, no person to assist her, and the lower step of the car being so far from the ground as to be likely to cause a person circumstanced as she was to fall in trying to leave the same; and that the ground was rough and stony so that if a person fell thereon a personal injury would be likely to follow.

There was evidence on defendant's part that the car opening, when plaintiff testified she alighted, was at the platform and that she was in fact injured by leaving the car some time before it reached the stopping place.

The jury found: (1) Defendant failed to provide a safe and convenient place for passengers to alight on the occasion in question. (2) Defendant failed to provide a suitable light to enable passengers to safely leave the cars. (3) Defendant failed to provide suitable assistance to enable passengers to safely alight from the cars on the occasion in question. (4) The forward end of the coach in which plaintiff was a passenger was not opposite the depot platform when the train stopped. (5) Plaintiff did not alight from the car before it stopped at the station. (6) The proximate cause of the plaintiff's injury was the negligence of the defendant as found. (7) Plaintiff was not guilty of any want of ordinary care which contributed to produce her injuries. (8) Plaintiff was damaged to the extent of $600.

On motion of defendant's counsel the court set aside findings 1 to 7 inclusive, and rendered judgment dismissing the complaint with costs.

For the appellant there was a brief by *Gittings & Burgess,* attorneys, and *Wallace Ingalls,* of counsel, and oral argument by *Mr. Ingalls* and *Mr. Roy Burgess.*

For the respondent there was a brief by *H. H. Field* and *Thomas M. Kearney,* and oral argument by *Mr. Kearney.*

MARSHALL, J. It seems that the decision of the trial court went upon the theory that all reasonable probabilities from the evidence indicated that appellant left the train while it was in motion and that when it stopped the opening made ready for her was at the depot platform. To sustain the judgment counsel for respondent confidently refer to *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *O'Brien*

v. C., St. P., M. & O. R. Co. 102 Wis. 628, 632, 78 N. W. 1084; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 80 N. W. 471; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 345, 85 N. W. 1036, and similar cases. Doubtless the learned trial court supposed that upon the evidence such cases were controlling. That was error, as we will briefly show.

Here there is no dispute that when appellant left the train the door of the vestibule where she made her exit was not at the depot platform, and there is no serious dispute that if she testified to the truth she was entitled to recover. There was some testimony corroborating hers. There was much evidence that her story was false and that she received her injury by leaving the train before it stopped. The right of the matter depended upon whether her evidence was worthy of belief in any reasonable view thereof. There was no circumstance established beyond reasonable controversy by means of which the truth of it could be tested so as to leave no reasonable doubt in respect thereto. There was a sharp conflict between the evidence upon one side and that upon the other, as the same fell from the mouths of witnesses. The rule invoked does not apply to such a situation, as will readily be seen. It is as well stated in *O'Brien v. C., St. P., M. & O. R. Co. supra,* as in any of them, in this language:

"If the truth of the proposition be not within the range of probabilities, in the light of reason and common sense, in view of facts of common knowledge or facts established in the case beyond reasonable controversy, then evidence of the existence of the fact involved does not prove such existence or tend to prove it."

"If the evidence of plaintiffs in this case, taking the most favorable view it will reasonably bear, including all reasonable inferences therefrom, assuming that it establishes all that it tends to establish when viewed in the light of undisputed facts, would support a verdict in plaintiffs' favor, then the case should have been submitted to the jury for decision,

and we should say that the evidence is sufficient for such verdict if, in view of conceded or undisputed facts on plaintiffs' evidence, there is room for unbiased minds to reasonably differ as to where the truth lies, not regarding, in reaching that result, mere conjecture or possibility."

Thus it will be seen that the element of facts within common knowledge or conceded or undisputed facts, may furnish a test of the truth of evidence from the mouths of witnesses, so certain in its character as to leave no reasonable probability to the contrary upon which an honest verdict can be based. In such circumstances the unimpeached and unimpeachable circumstance so within common knowledge or so established or conceded, condemns all evidence in conflict therewith, in form as false. So it was said, in effect, in *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179, that since it is a matter of common knowledge that a person possessed of unimpaired sense of sight can and must necessariliy see all objects in his immediate vicinity if he directs his attention thereto, his testimony that he did so and yet did not see such objects must necessarily be false. In *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360, the plaintiff testified that the street car which collided with his wagon was going at a speed of twenty miles an hour; that, going at such speed, the collision took place before he had an opportunity to avoid it. The fact was undisputed that neither the car nor the wagon, after the accident, showed any evidence thereof, and that the car was stopped in such a short distance after the collision as to be inconsistent with its going at more than an ordinary rate of speed shortly before the contact. In that situation the court said:

"Where all reasonable probabilities from facts unquestionably established by the evidence are on one side of a controversy, the testimony of an interested party to the contrary does not create a conflict of evidence requiring such controversy to be submitted to a jury."

In this case, as before suggested, there was no fact within common knowledge, and no conceded fact, and no fact established beyond reasonable controversy, rendering the evidence of plaintiff that she did not leave her seat to alight from the car, nor alight therefrom, till it stopped, entirely unworthy of belief. The only circumstance in that regard claimed by respondent is the severity of appellant's injuries. True, it is not easy to reconcile that with the car being at rest when she stepped therefrom, but it is more difficult, it seems, to reconcile the circumstance that she was not more severely injured with the idea that she stepped from the car when it was several hundred feet from where it stopped and was going so fast that in the fall her hat and some other articles of her property became separated from her person by 120 feet. In short the truth of the matter was determinable only by weighing the evidence on the part of appellant against that on the part of respondent, with no undisputed circumstance to throw into the balance on either side. In that situation a verdict might rest upon the uncorroborated evidence of the plaintiff if the jury under all the circumstances deemed the same to outweigh the evidence on the part of defendant so as to produce conviction to a reasonable certainty, as to the truth respecting the proposition involved.

The trial court having reached the conclusion complained of by a misapplication of legal principles to the evidence, a new trial is unnecessary. The judgment appealed from, and the intermediate order setting aside the answers to the special questions, should be reversed and judgment rendered upon the verdict in favor of plaintiff. The facts found by the jury show actionable negligence. We cannot doubt that it is negligent for a railway company to stop its train on a dark night in an unlighted locality for passengers to alight therefrom, when in order to do so they must necessarily step down a distance so great as to imperil personal safety. Reasonable care for the convenience and personal safety of

patrons of railway passenger trains demands that in boarding or alighting from cars they shall be afforded an opportunity to step from the depot platform to the lower step of the car or from such step to such platform, or that some convenience in lieu of a platform be furnished, and that in the nighttime the way to and from the cars be sufficiently lighted to enable them in the exercise of ordinary care to observe, reasonably, their surroundings. To stop a train where persons, especially women, are compelled to pass from the lower step of the car to the surface of the ground without any intermediate rest is improper at any time, and actionably so under the circumstances testified to by appellant in this case and found by the jury.

By the Court.—The judgment and order upon which it is based are reversed, and the cause is remanded with directions to render judgment in favor of the plaintiff upon the verdict.

EUTING, by guardian *ad litem,* Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 23—March 22, 1904.

(1) *Decision on former appeal: Effect.* (2–4) *Railroads: Exploding torpedo on track: Injury to bystander: Liability: Damages.*

1. A decision upon a former appeal that upon certain facts defendant is liable for an injury becomes a rule of law governing the parties in the action at all subsequent stages thereof.
2. The evidence in this case is *held* to support a special finding by the jury that a torpedo which was placed upon the rail near an engine was so placed, not by the fireman, but by the engineer himself, who thereupon moved the engine over it, causing it to explode and injure the plaintiff.
3. It is immaterial whether or not the torpedo was so placed upon the track in the conduct of defendant's business if the engineer ran the engine over the torpedo in the conduct of such

business, with knowledge of its presence, under the circumstances of plaintiff's proximity and peril.

4. By the explosion of a torpedo the main artery in the thigh of a boy nine years old was severed and, after healing, an aneurism developed which necessitated a serious operation, as a result of which the strength and vigor of the limb were likely to be in some measure permanently impaired. He was obliged to travel on crutches for about two years, and suffered great pain up to a time considerably beyond the operation, with some pain up to the time of the trial, three years after the injury. *Held*, that an award of $2,000 damages was not excessive.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an appeal from judgment in favor of the plaintiff rendered upon a retrial of the same action considered at 116 Wis. 13, 92 N. W. 358. The jury returned a special verdict that the plaintiff was injured by explosion of the torpedo; that such torpedo was placed on the rail not by the fireman, but by the engineer, in the conduct or performance of defendant's business; and that the engine was started by the engineer, and not by the fireman, with knowledge that the torpedo was upon the rail; that the placing of the torpedo upon the track and its explosion were the proximate cause of plaintiff's injury, and that his damages were $2,000. Defendant moved to change the answers to the questions so as to find that the fireman placed the torpedo, and that the engineer had no knowledge of such fact, and that it was not so placed in the conduct of defendant's business. That motion, as also a motion for a new trial, was overruled, and judgment entered.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *Baker & Baker,* and oral argument by *N. L. Baker.*

DODGE, J. The weight of appellant's contention is addressed to the claim that the finding that the engineer placed the torpedo on the rail is not supported by the evidence. This

conclusion rests upon the testimony of three boys, who are all positive in their statements that the engineer was the man who did this. Confessedly, it was either the engineer or fireman, and the question is mainly one of identification. That identification on the last trial was threefold: First, the testimony is positive that the man who placed the torpedo was the man who started the engine, and the engine was confessedly started by the engineer; secondly, that the man who placed the torpedo was the older and grayer man of the two—both the fireman and engineer being in court for the inspection of the jury; again, that two of the boys, some months afterwards, recognized the man who was running the same engine (concededly the engineer) as the man whom they say put the torpedo on the track; and, further, the same witnesses identified the engineer in court as that man. This evidence is stronger and more definite than was the proof upon the former trial, which this court held sufficient to raise a jury issue. Counsel for appellant urges that this testimony is incredible, but it is so only if we must believe the testimony of the engineer and fireman, who do, indeed, testify not only to acts, but to facts inconsistent therewith. This, however, does not create that phase of incredibility which warrants the court in taking from the jury the right to weigh evidence. Such condition no more than raises a question of relative credibility of conflicting witnesses, which is essentially within the jury province. We deem it clear that there is evidence which might have been believed by the jury sufficient to support their finding on this question. The fact being thus established, the liability of the defendant was settled upon the former appeal. The decision then made became a rule of law governing the parties in this action at all future stages thereof, and no error can be attributed to the trial court in applying that rule to the same state of facts considered in that opinion. *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 480, 80 N. W. 752; *Wollman v. Ruehle,* 104

Wis. 603, 80 N. W. 919; *Finney v. Guy,* 111 Wis. 296, 87 N. W. 255; *Collins v. Janesville,* 111 Wis. 348, 359, 87 N. W. 241, 1087.

Some contention is made that the damages are excessive. The plaintiff, about nine years of age, received an injury which severed the main artery in his thigh, which, after healing, developed an aneurism, which necessitated his being sent to a hospital in Chicago and there subjected to the serious operation of reopening the wound, removing the aneurism, and tying up the artery, thus destroying the main femoral artery as an unbroken duct for all time, necessitating that the blood to nourish that limb shall find its way through smaller auxiliary arteries, whereby, as there is some testimony, the strength and vigor of the limb are likely to be in some measure impaired permanently. Great pain and suffering accompanied the injury and the period up to and considerably beyond the operation, and diminishing pain continued up to the time of trial, some three years after the injury. The plaintiff was obliged to travel on crutches for about two years, and still suffered some, though not very serious, impairment of the use of the limb. In this situation we are unable to say that $2,000 is so excessive an allowance as to warrant this court, upon appeal, in setting aside the verdict after the same has received the approval of the trial court upon a motion for new trial.

A further finding by the special verdict that the torpedo was placed on the track in the conduct of defendant's business is assailed as unsupported by evidence. That is, however, so entirely immaterial to the result that we may forego consideration of the assignment of error. Concededly, the engineer ran the engine over the torpedo in the conduct of defendant's business. If he did so with knowledge of its presence, under the circumstances of plaintiff's proximity and peril, the defendant's liability is established by the holding on the former appeal.

By the Court.—Judgment affirmed.

RICKEMAN, Respondent, vs. WILLIAMSBURG CITY FIRE INSURANCE COMPANY and others, Appellants.

February 23—March 22, 1904.

Fire insurance: Amount of loss: Evidence: Court and jury: View of premises: Removal of debris to destroy evidence: Taking memoranda to jury room: Fraud: Overstatement of loss: Evidence of financial condition.

1. In an action upon a fire insurance policy the evidence is *held* sufficient to sustain the findings of the jury as to the amount of the loss, so that the refusal to set aside those findings was not error.
2. Whether the jury shall view premises is a matter in the discretion of the court.
3. Instructions assuming that the insured had removed the debris of a fire with the intent and for the purpose of destroying evidence are *held* to have been properly refused, it being a question for the jury, upon the evidence, whether the removal was prompted by such motives or not.
4. It was not an abuse of discretion, in this case, to permit the jury to take with them, on retiring, a tabulated statement, made by plaintiff's attorney, of the items of loss for which he claimed there should be a recovery under the proof, the contents of such statement having been given, without objection, in argument to the jury, and they being instructed that it was to be used merely as a memorandum to assist them in reviewing and considering the evidence, if they found it accorded with the evidence.
5. Defendants alleged that the policies in suit had been avoided by fraudulent overstatement of the loss, and that the insured did not in fact have on hand, at the time of the fire, the large stock of goods, consisting of articles readily convertible into money, which she claimed to have then had and to have held and stored for some years. *Held*, that upon this issue of fraud defendants might show that the insured, at and prior to the time of the fire, was in straitened financial circumstances.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

This action is brought by respondent to recover a loss to her stock of groceries, tobacco, liquors, furniture, and fixtures, insured by appellant. The facts show that she was

conducting a general grocery business in the city of Racine, in her own store, under the management of her sons, George and Fred Rickeman. On September 2, 1902, a fire occurred in the store, damaging the contents and parts of the building. She caused proofs of her loss to be made and served on the companies, and commenced action to recover the amount of damages claimed by her, as set out in the proofs of loss. The companies answered, denying the amount of the loss, and claimed and asserted that the loss did not exceed $1,804.81. They answered, relying on the stipulation of the policy which avoids the contract for concealing or misrepresenting any material facts or circumstances concerning the insurance, or if the interest of the insured in the property be otherwise than stated, or in case of any fraud or false swearing by the insured touching any matter relating to it before or after the loss; and they alleged that she fraudulently represented in her claims and proofs of loss that the loss sustained by her on the stock of goods and merchandise amounted to the sum of $11,156.84, and that she knew, in fact, it did not exceed $1,219.15.

The building was built of brick, having a basement, and ground and second floors, all occupied by the insured in conducting her business. It was about eighteen feet in width and fifty-five feet in length. The first floor was used for merchandising in retail. The second floor was divided by a wooden partition which cut off the north end, made into two rooms, and connected with the other part of this floor, which was used for the general storage of merchandise. The floor, framework, side, roof, partition, doors, windows, and studding in the second floor were of pine wood. There was an attic over this floor, separated by rafters, with loose boards over part of the rafters. The fire occurred on the morning of September 2, 1902. The goods which are claimed to have been totally destroyed were on the second floor. The principal controversy pertains to the loss on a stock of sugar, a

stock of cigars, a stock of Old Crow whisky, and a stock of tea. The sugar is described as 100 sacks, of 100 pounds each, of granulated sugar, piled in layers about six feet high and about sixteen or eighteen feet in length along the center of the storeroom; the cigars, as from fifty to sixty thousand, placed in tiers of boxes on deep shelves at the side and near the partition in the north end; the liquor, as Old Crow whisky, in quantity, 235 gallons, purchased in 1883, stored in tin cans in recent years, and placed on boards which lay on the rafters, and formed the floor of the attic; and the tea, as kept and stored in the original chests or packages.

The special verdict found the following facts: The loss on goods not totally destroyed amounted to $1,554.87; damages to furniture and fixtures, $585.66; loss in liquors, $3,795.60; loss in sugar, $475; loss in tea, $1,135; loss in cigars, $2,740; and that the insured did not falsely and fraudulently misrepresent the amount of the loss of the property covered by the policies issued by the companies.

After verdict, appellants moved the court to set aside the answers to the questions finding the amount of loss on sugar, tea, liquors, and cigars, as well as the answers to other questions, upon the ground that they were without evidence to support them, and because against the law and the evidence, and also moved to set aside the whole verdict and for a new trial. These motions were denied, and judgment was thereafter entered upon the special verdict in respondent's favor for the damages found, with costs. This is an appeal from that judgment.

For the appellants there was a brief by *Chynoweth & Mason,* and oral argument by *H. W. Chynoweth.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *J. V. Quarles, Jr.*

SIEBECKER, J. The first question raised is whether the verdict is based upon testimony so highly improbable as to

bear conclusive evidence on its face of bias and prejudice, and for that reason should have been set aside by the court. Appellant asserts that the evidence fails to show a loss of the sugar, tea, liquors, and cigars as found by the jury. It is admitted that the evidence adduced by respondent, standing alone, would support the verdict; but it is claimed, that this evidence is made incredible by the facts and circumstances of the case, and that the evidence of the destruction of the sugar and the tobacco by this fire is inherently incredible. It is argued that all the credible evidence in the case shows that the fire, as observed by the eyewitnesses, and from its consuming power, shown by the effects on the building and other combustible material in the store, could not have destroyed the quantity of sugar and cigars as found by the jury. This involves an inquiry as to the duration of the fire, its destructive power as to these articles, and whether there is evidence tending to show that the articles found by the jury to have been destroyed were actually in the store. We cannot give assent to the contention that the evidence is conclusive that the fire existed for a period of only twenty minutes. True, the policeman testifies that he passed over the street near the store a short time before the fire was discovered, and then saw no evidence of fire. Still no conclusive inference can be drawn from his testimony that the fire may not have been in progress for a considerable time before he discovered it. The only other evidence bearing on this question is the testimony of the fire's progress when it was first observed by the firemen, and the damage done to the building and contents. The facts, however, furnish no conclusive basis for fixing the duration of the fire before it was discovered. Much stress is laid upon the positive testimony of experts, who expressed the opinion that the quantity of sugar found to have been lost could not have been consumed by a fire of this magnitude in the time specified in the hypothesis to the question put to them as to the dura-

tion of the fire, to the effect that it would require several hours of a very intense heat to destroy the specified quantity of sugar, and that a fire sufficient to destroy the sugar would have destroyed the building and its contents. Experts called by respondent on the same subject testified that in their opinion the sugar might have been destroyed without damaging the building any more than it did, but that it would require a longer time than specified in the hypothetical question. We have adverted to the fact that the fire may have existed in the store for a longer period than "about twenty minutes" as assumed in the opinion testimony. Does the testimony show that the jury's finding as to the quantity of sugar destroyed is inherently incredible, under the conceded facts, or is it against all the reasonable inferences and probabilities in the case? The facts which were assumed in giving the opinion testimony were in dispute, as regards the duration of the fire, its destructiveness and magnitude, the quantity of sugar actually consumed by fire, as distinguished from the amount lost as the result of the fire, as well as the destructive effect of the fire on the building. In this situation, it was necessary for the jury to find these facts, and, if the basic assumptions were not found by them from the evidence, then the conclusions based thereon furnished no facts for the court or jury to act upon. Upon this subject the direct evidence of respondent's sons and daughter, testifying to the amount and actual presence of the sugar, tea, liquors, and cigars in the store on the evening before the fire, must be taken into consideration, as well as the corroborating facts and circumstances arising out of the conduct of the business, as should also the evidence of the witness Vard, who stated that he saw the sugar, cigars, and other articles in the store on the evening before the fire, as well as the testimony of eight other witnesses who testify that they saw the sugar, cigars, and other articles in the store, in the places and in the quantities as described, at times varying from a day or

two to a few weeks before the fire. It is asserted that a number of firemen and others testified that they swept the water out of the store after the fire, and that they observed no sugar, no evidence of whisky, smelt no cigars or liquor, and saw very slight evidence of tea chests. It is, however, undisputed that from four to five hundred pounds of sugar was saved out of the sugar piled in this room. Nor can we say it conclusively appears that a considerable quantity of sugar may not have been destroyed by the large quantity of water poured into this storeroom to extinguish the fire. A careful examination of all the evidence leads to the conclusion that the evidence of the loss of the sugar, tea, cigars, and liquor was properly submitted to the jury, under the rule that, if there is any credible evidence in the case from which a reasonable inference may be drawn in support of the claim of either of the parties to the action, then the court cannot assume to decide the controversy as a matter of law. *Lewis v. Prien,* 98 Wis. 87, 73 N. W. 654; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57.

The court refused to have the jury view the premises. This is a matter in the discretion of the court, and we find nothing to show that the court abused it.

Appellant requested several instructions to the effect that respondent and her agents had concealed and destroyed evidence by removing the debris, as shown by the proof, and that this conduct raised every intendment and presumption against the justice of her claim. The requests, in effect, assumed that the debris was removed with the intent and for the purpose of destroying evidence. It was for the jury to determine whether the parties were prompted by such wrongful motives, or not, under the facts and circumstances showing the opportunities which had been given defendants to make examination of it, the length of time it had been kept, and the explanations given why it was removed in the manner and at the time shown. The instructions given by the

court upon this subject gave the rule applicable to the facts in the case. No error was committed in refusing the instructions requested.

Respondent's counsel requested that the jury be permitted to take with them a tabulated statement made by him, and used in argument before the jury, of the items of loss which the insured claimed the right to recover under the proof. Appellant objected to this request upon the ground that no opportunity had been afforded for an examination of the statement to ascertain whether it conformed to the evidence. The court granted the request and instructed the jury that it was to be used merely as a memorandum to assist them in reviewing and considering the evidence, if they found it accorded with the evidence. Its contents had been given in argument to the jury, and presumably in the presence and hearing of opposing counsel. There is nothing to show that its use before the jury was objected to, or that it was in fact an incorrect memorandum of the data of the evidence in the case. The practice of submitting statements of this nature to the jury, and permitting them to be taken to the jury room, must rest largely in the sound discretion of the trial court. It should be indulged with care and caution to prevent any prejudicial consequences. Under the circumstances, we find no abuse of the practice in this case. *Harroun v. C. & W. M. R. Co.* 68 Mich. 208, 35 N. W. 914; *Greff v. Blakc,* 16 Iowa, 222.

We now come to the assignment of error bearing on the issue of fraud raised by the pleading. Appellant alleges that the policies are avoided by respondent's conduct in presenting a false and fraudulent claim as to the amount of her loss on the stock of merchandise covered by the policies. The evidence tended to show that she kept and stored a large stock of liquors and cigars for years before the fire, and that she also had a considerable stock of tea and sugar, which were marketable articles, readily converted into money. Appel-

lant sought to elicit facts tending to show the fraud charged in falsely overstating her loss, on cross-examination of respondent's sons and daughter, who had full charge of her business, by inquiring of them whether they had not been in pressing need of money to carry on the business while keeping all these goods in store, and were therefore compelled continually to overdraw her bank account. For the same purpose the defendants offered respondent's bank deposit book in evidence. All of this evidence was excluded on the ground that it was irrelevant and immaterial. We are constrained to hold that the court erred in its view of this evidence. The defense of fraud was asserted to defeat the policy. It is claimed that she was in a straitened financial condition, which made it improbable that she carried a large stock of goods. The insured claimed a large loss on merchandise, part of which she had held and stored for an unusual length of time. It was charged that she in fact had no such goods. It is a matter of common knowledge that such merchandise is readily converted into money in the open market. The inquiry arises, Would not a dealer having such a stock be likely to convert it into money to relieve his straitened financial condition? We are of opinion that respondent's financial condition, under such circumstances, had a direct and important bearing on the issue of fraud. Wide latitude is given in allowing evidence relevant to such inquiry, as touching the good faith of the transaction. *Kalk v. Fielding,* 50 Wis. 339, 7 N. W. 296; *Williams v. Williams,* 102 Wis. 246, 78 N. W. 419.

A number of exceptions were preserved upon rulings on questions of evidence which are not likely to arise again upon another trial, and we therefore omit further discussion.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DR. SHOOP FAMILY MEDICINE COMPANY, Appellant, vs. SCHOWALTER, Respondent.

February 24—March 22, 1904.

Appealable orders: Settlement pending suit: Jurisdiction: Judgment of dismissal: Costs.

1. An order denying a motion for findings and judgment in plaintiff's favor, on the ground that the court has no jurisdiction, "in effect determines the action and prevents a judgment from which an appeal might be taken," and is appealable under subd. 1, sec. 3069, Stats. 1898.
2. In an action for specific performance of a contract plaintiff paid into court $50 for defendant's benefit, and defendant deposited in court a deed of the premises in dispute, to be delivered to plaintiff only upon payment by him of $175, the amount of a counterclaim. Afterwards by agreement defendant took the $50 and consented that plaintiff take and keep the deed without further payment; and plaintiff accepted and retained the deed. *Held*, that this was a voluntary settlement of the controversy by the parties.
3. Voluntary settlement of the controversy by the parties pending an action does not deprive the court of jurisdiction to enter judgment dismissing both the complaint and a counterclaim.
4. Except in case of some express statutory provision, an extinguishment of the entire cause of action by settlement pending the action with no mention of costs extinguishes the right to costs.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action in equity, brought to compel the specific performance of a contract. The complaint charged that a contract was made between the plaintiff and the defendant, by which, for a commission of $50, to be paid, the defendant was to purchase in his own name for the plaintiff a certain described piece of real estate on the best terms possible, not exceeding a certain price, and immediately after such purchase convey the same to the plaintiff; that the defendant purchased said property for $1,375, which sum the plaintiff

thereupon paid the defendant, but that defendant refused to convey the same to the plaintiff. Judgment was demanded that the plaintiff was the owner of the premises, and compelling the defendant to convey the same to the plaintiff. The defendant's answer set up by way of counterclaim a somewhat different version of the contract, and claimed that there was still owing from the plaintiff to the defendant $125 upon the purchase price of the premises, as well as $50 commission, making in all $175 which the plaintiff should pay under the terms of the contract. The defendant also brought into court and deposited a deed of the premises, which he offered to deliver to the plaintiff upon payment of $175, and prayed for judgment that, as a condition of the delivery of said deed, the plaintiff be required to pay said sum of $175, and that the defendant have judgment for costs. To this counterclaim the plaintiff replied by general denial.

There is no bill of exceptions. The action was tried, and the issues of fact were submitted to the jury for an advisory verdict, such verdict being, in effect, in accordance with the plaintiff's contention. After the return of the verdict the plaintiff moved for findings and judgment in its favor, and also for judgment dismissing the counterclaim. To these motions the defendant objected on the ground that there had been a settlement of the controversy by the parties, and two affidavits were filed, showing that on the trial of the action plaintiff paid $50 into court for the defendant's benefit, and that after the trial one of the plaintiff's attorneys met one of the defendant's attorneys in the office of the clerk of the court, and it was mutually agreed that the plaintiff should withdraw the deed and the defendant the $50 which had been deposited in court, and such withdrawals were made in pursuance of the agreement, and that the deed has ever since been in the possession of the plaintiff. These facts were not disputed by the plaintiff. The court filed a decis-

ion stating that, in his opinion, these acts constituted a full settlement of the controversy, and that the court had no further jurisdiction. Afterwards the court made an order upon the motions reciting the facts, and ordered and adjudged that the action was fully settled and the court was without jurisdiction to make findings or render judgment on either of plaintiff's motions, and therefore the same were denied. From this order the plaintiff appeals.

For the appellant there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.* As to appellant's right to costs, they cited *Kusterer v. Wise,* 59 Mich. 382; *Jeffersonville R. Co. v. Weinman,* 39 Ind. 231; *Wagner v. Wagner,* 9 Pa. St. 214; *Martin v. White,* 1 Bibb, (Ky.) 583; 5 Ency. Pl. & Pr. 147, par. *b; Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210.

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

WINSLOW, J. There can be no question but that the action of the court appealed from in the case is an order, and not a judgment. It is true that the word "adjudged" is used in the body of the document, but upon close examination we find that all it attempts to do is to deny certain motions for findings and judgment on the ground of lack of jurisdiction. "A judgment is the final determination of the rights of the parties in the action." Sec. 2882, Stats. 1898. That the order in question is not such a determination seems self-evident. It simply refuses to determine them. Being an order, the question of its appealability, though not debated by the parties, must necessarily be considered, as it is a jurisdictional question. It seems evident that, generally speaking, an order simply refusing to make findings and judgment in plaintiff's favor would not be appealable, because it would not be an order in effect determining the action nor prevent-

ing a judgment from which an appeal might be taken. Subd. 1, sec. 3069, Stats. 1898. Judgment for the defendant might still be entered notwithstanding the refusal to enter judgment for the plaintiff. In fact, the order might be made for the very reason that judgment for the defendant should be rendered. Where, however, the order is based upon the ground that the court has no jurisdiction, the situation is entirely different. The effect of the order then is that no judgment can ever be entered. It is in all essential respects similar to an order striking a cause from the calendar on the ground of lack of jurisdiction, which this court has held appealable. *Ashland v. Whitcomb,* 114 Wis. 99, 89 N. W. 886.

The trial court held, upon the facts presented in the affidavits, and undisputed, that there had been a voluntary settlement by the parties of the entire controversy, and the first question to be considered is whether this conclusion is correct. Of course, the mere act of withdrawing from court money tendered by the opposing party does not of itself constitute a settlement or discharge of a claim. This is well understood. Money so tendered belongs to the party for whose benefit it is paid into court. *Fox v. Williams,* 92 Wis. 320, 66 N. W. 357; *Schnur v. Hickcox,* 45 Wis. 200. In the present case the plaintiff had paid into court $50 for the defendant's benefit, and the defendant had deposited in court a deed of the premises in dispute, not for unconditional delivery to the plaintiff, but only to be delivered on payment by the plaintiff of $175. The plaintiff was not entitled to the deed under the tender except upon condition that it pay this last-named sum. This being the situation, the parties met, and by agreement took both the money and the deed out of the custody of the law. The defendant took the $50, consenting at the same time that the plaintiff might take and keep the conveyance without paying the additional sum which

he had demanded in his answer. The plaintiff accepted the deed, and has ever since retained it. Here was not a mere withdrawal by one party of money or property deposited in court without condition, but a voluntary withdrawal by both parties of both deed and money from the court, and an exchange of the same by virtue of a new agreement, whose conditions differed materially from the conditions under which they were held by the court. We cannot but regard this as a voluntary settlement of the controversy by the parties pending the litigation, and the only remaining question is as to the effect of the settlement upon the litigation itself. Upon this question the conclusion of the trial court seems to have been that there was a complete loss of jurisdiction, and that the action can never be disposed of, but must be left forever hanging between heaven and earth, like Mahomet's coffin. This was certainly an erroneous idea. Although there was no jurisdiction to try the controversy because the controversy had passed out of existence, still there was jurisdiction left in the court to dismiss both the complaint and the counterclaim because the controversy had been settled. Where no controversy exists, a court will dismiss the action for that very reason. *Williams v. Williams,* 117 Wis. 125, 94 N. W. 25. So, while the court was right in refusing to make findings and judgment for the plaintiff upon its original cause of action, it was wrong in holding that there was no jurisdiction in the court to enter any judgment, and wrong in denying the motion to dismiss the counterclaim. Judgment should have been entered dismissing both the complaint and the counterclaim. There could be no costs properly granted to either party upon the dismissal, because both causes of action had been entirely extinguished by the settlement. Except in case of some express statutory provision, an extinguishment of the entire cause of action by settlement pending the action with no mention of costs extinguishes the right to

costs. *Geiser T. M. Co. v. Smith,* 36 Wis. 295; *Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210, 42 N. W. 232; *Cernahan v. Chrisler,* 107 Wis. 645, 83 N. W. 778. It seems best to reverse the entire order and direct the proper judgment.

By the Court.—Order reversed, with costs, and action remanded with directions to dismiss the complaint and counterclaim without costs in the trial court.

INDEX.

ABUSE OF DISCRETION. See APPEAL, 1, 2, 11–15. COSTS, 1. JUSTICES' COURTS, 5.

ABUTTING OWNERS. See EMINENT DOMAIN, 1–3. HIGHWAYS, 5–7. MUNICIPAL CORPORATIONS, 9, 10.

ACCEPTANCE. See CONTRACTS, 1.

ACCORD AND SATISFACTION.

See COMPROMISE AND SETTLEMENT. COSTS, 4.

1. Evidence of interviews between the attorneys who acted for plaintiff and defendant in a former suit between them, in which it was claimed the matter in controversy in the present action was compromised, which did not take place in the presence of plaintiff or her agents and were not shown to have related to matters within the authority of plaintiff's attorney, is *held* to have been properly excluded on plaintiff's objection. *Fosha v. O'Donnell,* 336

2. An attorney can bind his client in an attempted accord and satisfaction only upon an express authorization. *Ibid.*

3. An attorney made an accord and satisfaction of several notes of his client without express authority, and neither the client nor her agents had knowledge of its terms when the proceeds were turned over to her, but supposed the amount received to have been taken in satisfaction of one note only, and, upon notice of the payor's claim that the settlement included all the notes the client promptly disavowed the attorney's acts. *Held,* that retention of the amount so paid, and failure to tender repayment upon discovery of the payor's claim, did not constitute an affirmance of the attorney's acts or a ratification of the accord and satisfaction. *Ibid.*

4. Plaintiff, the owner of three notes which defendant had assumed and agreed to pay, commenced an action upon the first note, which action was dismissed by stipulation, entered into, however, by plaintiff's attorney without authority, in consideration of payment to plaintiff of a sum less than the amount due on the note in suit, defendant believing the stipulation to be an accord and satisfaction of plaintiff's claim against him upon all three of the notes, and plaintiff receiving and retaining said sum upon the belief that it was in satisfaction of the note in suit only. Plaintiff subsequently brought an action on the other two notes and recovered judgment. *Held,* that the court should apply the amount paid under the supposed accord and satisfaction in part satisfaction of plaintiff's demand. *Ibid.*

ACTION.

Cause of action. See ACCORD AND SATISFACTION, 3, 4. ACTION, 4, 7. COVENANTS, 2. EQUITY. FACTORS, 3–6. FRAUDS, STATUTE OF. GARNISHMENT, 1. GUARDIAN AND WARD. HIGHWAYS, 15. NEGLIGENCE, 12. PAYMENT. QUIETING TITLE, 1–4. RAILROADS. RES ADJUDICATA, 2, 3. RELEASE. TAXATION, 7. SHERIFFS.

1. The allegations of a complaint for an injunction to restrain town officers from removing a fence which was claimed to be an encroachment on the public highway, and containing allegations of a previous action in the name of the state against the present plaintiff for the purpose of collecting a forfeiture for the maintenance of an encroachment upon a highway at the *locus in quo*, and judgment therein in favor of the state, examined and *held* to state a good cause of action in equity. *Swennes v. Sprain,* 68
2. An action under sec. 1331, Stats. 1898, to recover a penalty for the maintenance of an existing fence which encroached on the highway, where only the question of encroachment was pleaded and litigated, and an action in equity to enjoin the removal of a contemplated fence upon substantially the same line, while the same legal principles might be decisive in both cases, are not both founded on the same cause of action. *Ibid.*
3. A cause of action is not changed in character by reason of statutory regulation or modification of the circumstances out of which it would arise at common law, unless such statutes are penal. *Bain v. Northern Pacific R. Co.* 412

Same: Local or transitory?

4. A cause of action for personal injuries is not local, and the person liable therefor may be pursued in any jurisdiction where he may be found. *Bain v. Northern Pacific R. Co.* 412
5. The mere fact that a cause of action for personal injuries could not exist under the rules of the common law without the aid of the statutes of another state, is no obstacle to recovery thereon in the courts of Wisconsin. *Ibid.*

Limitations. See DEEDS, 3. INSURANCE, 1–4. LIMITATION OF ACTIONS.

Joinder of causes of action. See SCHOOLS, 2.

6. Joseph and Louis L., copartners doing business at A., and John L. doing business at S., entered a written order with plaintiff for its products, the contract being signed, "Jos. L. & Bro., John L. Purchaser" which was accepted. The writing commenced "Please enter *our* order," etc., and contained directions as follows: "1-2 bill to Jos. L." at A., "1-2 to John L." at S. In an action for the unpaid balance of the whole order brought against the partnership and John jointly, the complaint considered, and *held* to be demurrable for misjoinder of causes of action, the contract being unambiguous and directing the goods specified to be charged one half to the firm at A. and one half to John at S. *Racine W. & C. Co. v. Liegeois,* 497
7. An action in equity brought by taxpayers for the one general purpose of preserving the public funds from dissipation by public officers, presents but one primary right or subject of controversy for adjudication, although it thereby becomes neces-

sary to bring in numerous parties defendant whose rights may be entirely distinct as between themselves. *Carpenter v. Christianson*, 558

Money had and received. See SHERIFFS, 1.

ADDITIONAL BURDEN. See EMINENT DOMAIN.

ADJOURNMENT. See COUNTY BOARDS.

ADJUSTMENT OF LOSS. See INSURANCE, 19, 20.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS. See DAMAGES, 3. FALSE PRETENSES, 9.

ADVERSE PARTY. See WITNESSES, 5.

ADVERSE POSSESSION.

See DEEDS, 3.

1. Where an answer, in pleading the statute of limitations, specifically refers to the ten-year statute by sections, the fact that possession for twenty years is alleged instead of ten, as against a demurrer *ore tenus*, is not misleading and does not vitiate the plea. *Roberts v. Decker*, 102
2. In an action of ejectment against D. and B., allegations of the answer that D. entered into possession with S. in 1888 under claim of title founded on two certain deeds, and that since that entry D. and S., and the defendants, as purchasers and grantees from them, have been continuously in possession under claim of title founded on said deeds, is *held* sufficient as against a demurrer *ore tenus*, although no deed is specifically alleged to have been executed to B. *Ibid.*
3. Where the evidence shows that the grantee in a deed immediately took possession thereunder but did not record his deed, and that he and his grantees continuously remained in possession thereafter, such possession is actual notice of their rights, whatever they may be, to subsequent purchasers from the first grantor; and such unrecorded deed is admissible in evidence as against such subsequent purchaser. *Ibid.*
4. Where the person in possession of land under claim of title to the whole thereof has no knowledge that another, whose rights have never been acknowledged, claims an interest therein as his cotenant, it is not necessary that the possessor, in order to acquire title by adverse possession, should bring home to the person claiming cotenancy actual knowledge of the adverse character of his possession. *Ibid.*

AFFIDAVIT. See TAX TITLES, 1, 2.

AFFIRMANCE. See ACCORD AND SATISFACTION, 3, 4.

AGE. See EVIDENCE, 5. WITNESSES, 4.

AGENCY. See CONTRACTS, 2. DAMAGES, 10–13. FACTORS. INSURANCE, 4, 8.

AMBIGUITY. See ACTIONS, 6. ARBITRATION, 5. CONTRACTS, 3–5. CRIMINAL LAW, 14. SHERIFFS, 6.

AMENDMENTS. See APPEAL, 3, 21. JUSTICES' COURTS, 4. MORTGAGES, 2. PAYMENT, 2. TAX TITLES, 2.

ANTHRAX. See CONSTITUTIONAL LAW, 5.

ANTICIPATED DEFENSES. See QUIETING TITLE, 3–5.

APPEAL.

See SUPREME COURT.

Writ of error. See HABEAS CORPUS, 5.

Decisions reviewable: Appealable orders.

1. An order coming within the class denominated "discretionary orders," there being no abuse of discretion, is not appealable, and the appeal therefrom should be dismissed. *R. Connor Co. v. Goodwillie,* 603

2. An order denying a motion for findings and judgment in plaintiff's favor, on the ground that the court has no jurisdiction, "in effect determines the action and prevents a judgment from which an appeal might be taken," and is appealable under subd. 1, sec. 3069, Stats. 1898. *Dr. Shoop Family Medicine Co. v. Schowalter,* 663

Who may appeal: Party aggrieved.

3. Plaintiff having appealed to the circuit court from the action of the county board disallowing his claim filed against the county, gave an undertaking, substantially the same as one given in another case between the same parties, which the supreme court had held was such a compliance with the statutory requirements as gave the circuit court jurisdiction. On the hearing of a motion, addressed to the circuit court, to dismiss the appeal for defects in the undertaking, plaintiff asked leave to amend, and appealed from an order refusing such application. *Held,* that the undertaking being sufficient, the plaintiff was in no sense aggrieved by the order refusing his application to amend, and hence his appeal from such order should be dismissed. *Ellis v. Barron Co.* 390

Time for taking proceedings.

4. An order dismissing an appeal to the circuit court from the action of a county board disallowing a claim against the county, is not, in effect, a judgment, and hence an appeal from such an order, taken less than two years but more than thirty days after service of a copy, together with a written notice of its entry, is not taken within the time limited by sec. 3042, Stats. 1898. *Ellis v. Barron Co.* 390

5. Under sec. 3042, Stats. 1898, the thirty days' limitation does not commence to run against the one party until the other has served the notice therein prescribed, notwithstanding there is service of such order and exception to its entry. *Ibid.*

Exceptions and objections in trial court. See CRIMINAL LAW, 11.

Bill of Exceptions. See JUSTICES' COURTS, 6.

6. When no portion of the instructions to the jury appear in the bill of exceptions the supreme court will not review exceptions taken thereto on the trial. *Dornbrook v. M. Rumely Co.* 36

7. An objection that a verdict is perverse and contrary to the evidence cannot be considered in the absence of a certificate that the bill of exceptions contains all the evidence material to the case. *Kennedy v. Plank,* 197

8. The recitals in the certificate of the trial judge that the annexed bill of exceptions contains all the evidence, being in conflict

with the facts appearing on the face of the bill, such recital, as to all questions depending on such facts, must be regarded as untrue. *Gall v. Gall,* 270

9. A bill of exceptions showed on its face that a certain contract, in writing, between the parties was offered in evidence, but the contract itself was not contained in the bill. *Held,* that it must be presumed, in support of the judgment, that the contract so received in evidence showed a consideration for all the promises on the part of the defendant therein contained. *Ibid.*

10. The absence of a certificate that the bill of exceptions contains all the evidence does not prevent a review of the judgment by the supreme court, but merely precludes that court from examining any assignments of error which are predicated upon a disregard of the evidence, such as the directing, or refusing to direct, a verdict, and the like. *Lathrop v. Humble,* 331

Assignment of errors. See INFANTS. TRIAL, 6.

Dismissal. See APPEAL, 1, 3, 4. JUSTICES' COURTS, 3, 4.

Review: Scope and extent in general. See HABEAS CORPUS, 5.

Same: Discretion of lower court. See APPEAL, 1, 2. CONTINUANCE. COSTS, 1. JUSTICES' COURTS, 5. TRIAL, 2.

11. When a trial court has, in the exercise of its discretion, power to do or not do a certain act, a refusal to exercise such discretion upon the expressed assumption that it has no such power is an *error of law,* which eliminates from the case the question whether there was any abuse of discretion. *Ellis v. Barron Co.* 390

12. In such case, the supreme court, on appeal, will not consider the merits of the question thus addressed to the sound discretion of the trial court. *Ibid.*

13. The granting of a new trial is within the discretionary power of the court, and will not be reviewed on appeal unless the court has abused its discretion. *R. Connor Co. v. Goodwillie,* 603

14. Whether the jury shall view premises is a matter in the discretion of the court. *Rickeman v. Williamsburg City F. Ins. Co.* 655

15. It was not an abuse of discretion, in this case, to permit the jury to take with them, on retiring, a tabulated statement, made by plaintiff's attorney, of the items of loss for which he claimed there should be a recovery under the proof, the contents of such statement having been given, without objection, in argument to the jury, and they being instructed that it was to be used merely as a memorandum to assist them in reviewing and considering the evidence, if they found it accorded with the evidence. *Ibid.*

Same: Questions reviewed. See CRIMINAL LAW, 11. TRIAL, 3, 6, 8.

16. An exception to a particular ruling striking out evidence as not responsive to the question asked, does not preserve for review the proposition of whether such evidence was competent, even though the trial judge expresses an opinion in connection with his ruling that it is not. *Cupps v. State,* 504

Same: Respondents exceptions, when available?

17. A respondent may avail himself of his exceptions to findings to sustain the judgment appealed from. *Hart v. Jos. Schlitz B. Co.* 553

Same: Findings when disturbed.

18. Orders refusing a new trial in jury cases cannot be reversed on appeal upon the ground that the verdict is contrary to the weight of the evidence, unless it clearly appears that there is no credible evidence to support the verdict. *Kennedy v. Plank.* 197

19. Where there is evidence tending to support the conclusions of the jury, and it cannot be said that it is incredible, nor that all the reasonable probabilities and inferences are the other way, the rulings of the trial court therein cannot be reversed. *Busse v. Rogers,* 443

20. Findings of the trial court, unless against the clear preponderance of the evidence, will not be disturbed. *Duffy v. Hinkley.* 492

Affirmance and reversal. See APPEAL, 11. BUILDING CONTRACT, 1. COSTS, 1. JUSTICES' COURTS, 3. NEGLIGENCE, 16. NEW TRIAL, 2–4.

21. On the trial of an action for the price of a boiler, the real controversy had been as to the capacity of the boiler. At the close of the trial there was no evidence to support a recovery on the contract, or to support a cause of action *quantum meruit,* but the court nevertheless entered an order that plaintiff might amend its complaint by adding a count *quantum meruit,* and that defendant might answer thereto simply by general denial, and could introduce no other defense. *Held,* error, to be corrected by reversing the judgment and directing a judgment dismissing the complaint. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 1

22. A complaint did not contain a prayer for relief, but the objection on that ground was raised for the first time on the trial and overruled, and judgment rendered for the defendant on other grounds. *Held,* that the judgment would not be affirmed for the error of the trial court, if any, in overruling such objection, if other errors in the record necessitated a reversal. *Lathrop v. Humble,* 331

23. In an action upon a fire insurance policy the evidence is *held* sufficient to sustain the findings of the jury as to the amount of the loss, so that the refusal to set aside those findings was not error. *Rickeman v. Williamsburg City F. Ins. Co.* 655

Same: Material and immaterial error. See ATTORNEY AND CLIENT, 2. COMPROMISE AND SETTLEMENT, 1. CONTINUANCE. CRIMINAL LAW, 3, 7, 8, 10, 12–16. DAMAGES, 8, 9. ELECTION OF REMEDIES. EXECUTORS AND ADMINISTRATORS, 3. FALSE PRETENSES, 3–9. FRAUD, 4, 6. HIGHWAYS, 8. INSURANCE, 5–7, 18. JUDGMENTS. MASTER AND SERVANT. NEGLIGENCE, 1, 6, 11. RAILROADS, 2, 7–9. REPLEVIN, 5. SALES, 2. SHERIFFS, 3. STREET RAILWAYS. TAX TITLES, 2. TRIAL, 3, 6, 8, 9, 11–13, 16, 19, 20.

24. When, in view of the undisputed facts, a case is properly one for the court to direct a verdict, error in instructing the jury is harmless. *Dornbrook v. M. Rumely Co.* 36

25. It is not prejudicial error to admit immaterial evidence, which is harmless in its effect on appellant. *Rhodes v. Halvorson*, 99

26. Where a verdict is properly directed in favor of the plaintiff upon evidence properly in the case, the defendant is not prejudiced by the admission or retention of improper evidence. *Badger Telephone Co. v. Wolf River Telephone Co.* 169

27. An appellant is not prejudiced by a judgment which on the theory of the law advanced by him would result in his taking nothing. *In re Cowley's Will*, 263

28. Error in refusing to admit evidence is cured by subsequent admission of the evidence. *Fosha v. O'Donnell*, 336

Res adjudicata: Former appeal. See RES ADJUDICATA.

29. A decision upon a former appeal that upon certain facts defendant is liable for an injury becomes a rule of law governing the parties in the action at all subsequent stages thereof. *Euting v. C. & N. W. R. Co.* 651

Mandate directing judgment, when proper. See APPEAL, 21.

30. Where the facts found in a special verdict entitle the plaintiff to judgment but the trial court, by a misapplication of legal principles to the evidence, set aside the verdict and gave judgment for defendant, the supreme court, on reversing that judgment, will direct a judgment for plaintiff without a new trial. *Ellis v. C., M. & St. P. R. Co.* 645

Appeal from justices' courts. See JUSTICES' COURTS.

APPEALABLE ORDERS. See APPEAL, 1, 2.

APPLICATION OF PAYMENTS. See ACCORD AND SATISFACTION, 4.

ARBITRATION AND AWARD.

1. An agreement between a judgment debtor and his creditor—the subject-matter of the judgment being in dispute—submitting without qualification the real right of the matter to arbitrators for decision, includes by necessary implication an agreement to discharge such judgment and a court of equity, in the absence of some countervailing equity of the creditor, will, at the suit of the debtor, enjoin the inequitable use of such judgment and compel its discharge. *Jones v. Thomas*, 274

2. An agreement to submit the subject of the validity of a judgment to arbitrators to determine, such validity being in litigation, nothing appearing to the contrary, implies that such submission shall displace such litigation and that the judgment shall stand or fall as a result of the award. *Ibid.*

3. An agreement for arbitration of the character above suggested, including other matters of difference of a pecuniary nature, the right of the matter as to such other matters to be considered with the judgment indebtedness in determining what amount, if anything, shall be paid by either party to the other, implies that the judgment shall abide the result of the arbitration. *Ibid.*

4. An agreement of the character above mentioned, including, after describing the matters submitted, an agreement, in effect, that each party shall abide by the commands of the arbitrators, followed by language to the effect that all actions, suits or proceedings now pending shall be withdrawn and dismissed and

all judgments or liens of either against the other shall be discharged, does not indicate beyond reasonable controversy a mutual intention that the discharge shall occur regardless of the award, and that the remedy of either party to collect any sum found due him shall be upon the award alone. *Ibid.*

5. A construction put upon an ambiguous arbitration agreement by the parties thereto and by the arbitrators, up to and inclusive of the time of the making of the award, which is reasonable and equitable, may properly be held to be the one intended to be incorporated therein. *Ibid.*

6. A controversy as to the amount that ought to be paid upon a judgment having been submitted to arbitrators and determined, equity jurisdiction cannot properly be used to prevent the enforcement of such judgment by ordinary means to the amount of the award upon the judgment debtor refusing to comply therewith. *Ibid.*

ARCHITECTS. See BUILDING CONTRACTS, 1–5.

ARGUMENTS OF COUNSEL. See TRIAL, 2.

ASSESSMENT. See TAXATION.

ASSIGNMENTS. See EVIDENCE, 9. GARNISHMENT, 2, 3. INSURANCE, 19–21. LANDLORD AND TENANT, 1. PARTIES. RELEASE.

ASSUMPTION OF RISK. See RAILROADS, 9.

ATTORNEY AND CLIENT.

See ACCORD AND SATISFACTION. TRIAL, 2.

1. In purchases by an attorney of his client's property, the transaction is always viewed with suspicion, and the attorney must prove the utmost good faith on his part or the transaction will be set aside by a court of equity. *Young v. Murphy,* 49

2. Where an attorney purchased his client's real estate and thereafter mortgaged the same to one who had full knowledge of the client's equities therein, on the findings of the court, supported by the evidence, no error was committed in ordering the deed and mortgage to be canceled. *Ibid.*

ATTORNEYS' ARGUMENTS TO JURY. See TRIAL, 2.

ATTEMPT. See RAPE, 2.

ATTRACTIVE NUISANCES. See NEGLIGENCE, 13–15.

AUTHORITY. See ACCORD AND SATISFACTION. SCHOOLS, 3.

AVOIDANCE. See INSURANCE, 17, 18.

AWARD. See ARBITRATION. HIGHWAYS, 2, 7.

BALLOTS. See ELECTIONS, 1, 3.

BAYOUS. See BOUNDARIES, 4, 5.

BENEFIT ASSOCIATIONS. See INSURANCE, 1–8.

BEQUESTS. See WILLS.

BEST AND SECONDARY EVIDENCE. See EVIDENCE, 3–5. HIGHWAYS, 3.

BILL OF EXCEPTIONS. See APPEAL, 6–10. JUSTICES' COURTS, 6.

BILLS AND NOTES. See CONTRACTS, 6.

BIRTH. See EVIDENCE, 5.

BOARD OF DIRECTORS. See TELEPHONES, 2.

BOARDS OF HEALTH. See CONSTITUTIONAL LAW, 4–7.

BOARDS OF PUBLIC WORKS. See MUNICIPAL CORPORATIONS, 1.

BOUNDARIES.

See DEEDS, 1, 2.

1. The boundary line between this state and the state of Minnesota, where the Mississippi river divides them, is the center line of the main channel of said river. *Franzini v. Layland,* 72
2. The main channel of the Mississippi river means the principal navigable and navigated channel, the one customarily followed in steamboat navigation. *Ibid.*
3. Such boundary line may be very near the Wisconsin shore at some points, and very near the Minnesota shore at others, according to the location of the main navigable and navigated channel. It is a changing line, subject to property rights, as the pathway of navigation changes, according to the design of locating it at the center of the main channel that being to preserve for all time, within the boundaries of this state, one half of the navigable pathway of the river wherever located. *Ibid.*
4. The term "Mississippi river" used in the enabling act (ch. 89, p. 56, 9 U. S. Stats. at Large), descriptive of the boundary between this state and the state of Minnesota, applies to the broad expanse of water flowing in a generally southerly direction, known at the date of such act as such river, not any bayou upon either side thereof. *Ibid.*
5. No such bayou, though navigable when the state was admitted into the Union and then furnished and now furnishes the most feasible navigable channel for boats between the entry thereto and outlet thereof, can properly be referred to as the Mississippi river, the main channel of which is traversed by the boundary line between the states. *Ibid.*
6. Long acquiescence by sovereignties in a given situation as regards the boundary line between them, is very strong evidence of the right of the matter, is conclusive between private parties, and may be of such length of duration as to be likewise conclusive between sovereignties *Ibid.*
7. A riparian proprietor upon a navigable stream in this state has absolute title to the land to the line of ordinary high water mark by virtue of the chain of title reaching back to the sovereign proprietor; but, as incident thereto, subject to what is said in the next paragraph, he owns to the center of the stream by the grace of the state, subservient, however, to public rights, substantially the same as those incident to navigable waters at the common law; and the size of the river does not in any event affect this rule. *Ibid.*
8. Where a river separates this state and another, the title, by grace of the former, to land owned by a riparian proprietor upon its side of the stream, goes to its boundary line, regardless of whether that is nearer to or further from the shore than the *filum aquæ* of the stream. *Ibid.*

BROKER. See INSURANCE, 8.

BUILDING CONTRACTS.

See GARNISHMENT.

1. In an action to recover for the services of an architect, the terms of the contract under which they were rendered being in dispute, the court instructed the jury that they could not find for the plaintiff unless they were satisfied by a preponderance of the evidence that the contract *was in all respects* as claimed by the plaintiff, and that if they were not so satisfied or were satisfied that the minds of the parties did not meet as to the portions of the contract in dispute, they should find for the defendant. *Held*, that a refusal to instruct, in effect, that if the jury should find the contract to be as claimed by the defendant the plaintiff could not recover, was not error. *Graf v. Laev*, 177

2. Where, in an action to recover for personal services, such as an architect's, the evidence shows part performance by plaintiff, and a willingness to perform the remainder, which was prevented by defendant, the plaintiff is entitled to recover the full contract price, in the absence of evidence that the plaintiff might have obtained employment elsewhere, or of any fact in mitigation of damages. *Ibid.*

3. In such case, the burden of proving mitigation of damages is on the defendant. *Ibid.*

4. Evidence, among other things, that an architect prepared plans for a building, retained the originals in his office, and had copies out with contractors; that several months later the owner told the architect that he did not intend to build, and that the architect then told the owner that he could have the plans at any time he wished to go ahead with the building, is *held* sufficient to sustain a finding of the jury that the plans had been tendered to the owner. *Ibid.*

5. Defendant took a contract to do the entire work of erecting a building according to plans and specifications and the satisfaction of designated architects. Plaintiffs had examined the plans and specifications and submitted to the owner a bid for the plastering at the same time defendant's bid was accepted. Thereafter defendant handed the plans and specifications to plaintiffs and requested a bid, which was given and rejected on account of the proposed price. Thereafter plaintiffs had an interview with defendant's agent which resulted in an agreement as to price, plaintiffs stating that their bid was "for the job" and such agent then stated, "Go ahead and do the work." *Held*, that plaintiffs were bound to do the work to the satisfaction of the superintendent designated in the specifications, and were only entitled to payment upon doing so. *Stein v. McCarthy*, 288

BURDEN OF PROOF. See ATTORNEY AND CLIENT, 1. BUILDING CONTRACTS, 3.

BY-STANDER. See RAILROADS, 3–5.

CANCELLATION OF INSTRUMENTS. See ATTORNEY AND CLIENT, 2.

CARRIERS. See EMINENT DOMAIN. RAILROADS. STREET RAILWAYS.

CATTLE. See CONSTITUTIONAL LAW, 5.

CAUCUSES. See ELECTIONS, 1, 3.

CERTIORARI. See HABEAS CORPUS, 4, 5. HIGHWAYS, 2.

CHARACTER, EVIDENCE. See CRIMINAL LAW, 1, 2, 6. FALSE PRETENSES, 6, 9.

CHARITABLE USE. See WILLS, 1.

CHATTEL MORTGAGES.

See REPLEVIN, 2-5.

1. Plaintiff's son placed with defendant an order for a threshing outfit which was accepted, plaintiff also signing the order. The order provided for giving notes and a chattel mortgage by the son, and for additional security by plaintiff's signing some of the notes. *Held*, that the fact that defendant accepted the son's individual notes and chattel mortgage indicated that it treated the son as the purchaser. *Dornbrook v. M. Rumely Co.* 36

2. In such case, the son's mortgage was not filed in town clerk's office of the town where the son resided. Defendant did not take possession until after the son, for a valuable consideration, had mortgaged the outfit to the father, and the father had purchased the outfit on foreclosing his mortgage. The defendant, claiming under its chattel mortgage, took possession and plaintiff brought replevin. *Held*, that defendant's mortgage was void as against that of plaintiff, and it was immaterial whether plaintiff knew his son had given defendant a chattel mortgage, nor was it material to inquire whether he knew or ought to have known that the son fraudulently intended to hinder and delay his creditors in giving the chattel mortgage. *Ibid.*

3. Plaintiff's son, in an order for a threshing outfit, incorrectly stated his residence to be in the town of M. This order was canceled, and a second order was taken in which the son correctly stated his residence as in the town of S. and this order was also signed by the plaintiff. Thereafter the son gave defendant a chattel mortgage on the outfit, stating his residence to be in the town of M., in which town defendant's chattel mortgage was filed. Plaintiff subsequently took a chattel mortgage on the same outfit, and in an action of replevin brought against defendant for the outfit the jury found that plaintiff, when he took his chattel mortgage, had no knowledge of defendant's mortgage, or that the son intended to hinder, delay or defraud his creditors, and that plaintiff did not collude with the son in foreclosing his mortgage. It also appeared that plaintiff had no knowledge of his son's misstatements as to residence. *Held*, that defendant's contention that plaintiff was guilty of collusion and fraud, which resulted in misleading it, and caused it to file its chattel mortgage in the town of M., was without foundation. *Ibid.*

CHILDREN. See INFANTS. NEGLIGENCE, 13, 14.

CITIES. See MUNICIPAL CORPORATIONS.

CITIZENS. See CORPORATIONS, 1.

CLASSIFICATION. See WILLS, 1.

CLERK OF COURT. See MORTGAGES, 1.

CLOUD ON TITLE. See QUIETING TITLE.

CO-EMPLOYEE. See RAILROADS, 8.

COLLUSION. See CHATTLE MORTGAGES, 3.

COUNTY. See CORPORATIONS, 1.

COMMISSION MERCHANTS. See FACTORS.

COMMITTEE of common council. See MUNICIPAL CORPORATIONS, 5–8.

COMMON COUNCIL. See MUNICIPAL CORPORATIONS, 1, 5–8.

COMMON SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

COMMUNICATIONS with persons since deceased. See WITNESSES, 5.

COMPENSATION. See EMINENT DOMAIN.

COMPETENCY. See EVIDENCE, 1, 2. WITNESSES, 4, 5.

COMPROMISE AND SETTLEMENT.

See ACCORD AND SATISFACTION. COSTS, 4. RELEASE.

1. It is not error to refuse to submit to the jury the question of a settlement, where no settlement was pleaded, and the evidence bearing upon that question was pertinent to the issues raised by the pleadings. *Gall v. Gall*, 270
2. In an action for specific performance of a contract plaintiff paid into court $50 for defendant's benefit, and defendant deposited in court a deed of the premises in dispute, to be delivered to plaintiff only upon payment by him of $175, the amount of a counterclaim. Afterwards by agreement defendant took the $50 and consented that plaintiff take and keep the deed without further payment; and plaintiff accepted and retained the deed. *Held*, that this was a voluntary settlement of the controversy by the parties. *Dr. Shoop Family Medicine Co. v. Schowalter*, 663
3. Voluntary settlement of the controversy by the parties pending an action does not deprive the court of jurisdiction to enter judgment dismissing both the complaint and a counterclaim. *Ibid.*

CONDEMNATION. See EMINENT DOMAIN.

CONDITION SUBSEQUENT. See VENDOR AND PURCHASER, 1.

CONDUCT OF COUNSEL. See TRIAL, 2.

CONSENT. See RAPE, 4–6.

CONSIDERATION. See APPEAL, 9. EVIDENCE, 10. FRAUDS, STATUTE OF, 6. REPLEVIN, 1. VENDOR AND PURCHASER, 1–3. WITNESSES, 5.

CONSIGNMENT. See FACTORS.

CONSOLIDATION. See CORPORATIONS, 5.

CONSTITUTIONAL LAW.

See CORPORATIONS, 1. ELECTIONS, 2, 3. EMINENT DOMAIN. HABEAS CORPUS, 1. RAPE, 3.

Legislative powers.

1. Ch. 160, Laws of 1903, entitled "An act to legalize the organization of joint school district No. 4, of the towns of R. and L. in K. county, and to legalize the subsequent acts and proceedings of the officers and voters of said district," and providing in the body of the act that the designated organization "is

hereby in all things legalized," and its acts and those of its officers and electors are legalized, only embraces one subject, and that subject is sufficiently expressed in the title, within the calls of sec. 18, art. IV, Const. *State ex rel. Vandenhouten v. Vanhuse,* 15

2. Said act is not repugnant to subd. 7, sec. 31, art. IV. *Ibid.*

3. Ch. 217, Laws of 1901, authorizing county boards to change the method of compensation of sheriffs from fees to a salary, does not conflict with sec. 23, art. IV, nor with sec. 26, art. IV. *State ex rel. Sommer v. Erickson,* 435

Police power.

4. The legislature may, under the police power, grant to boards of health authority to employ all necessary means to protect the public health, and may even authorize such bodies immediately and summarily to destroy private property which is in fact a nuisance or source of danger to public health, without a preliminary formal legal proceeding and a judicial trial. *Lowe v. Conroy,* 151

5. The appearance of a malignant and contagious disease, such as anthrax in cattle, is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only be effectually dealt with by the destruction of the animals afflicted. *Ibid.*

6. Where *quasi*-judicial officers, such as a health officer or board of health, have summarily destroyed private property on the ground that it constituted a menace or cause of sickness dangerous to public health, the owner thereof may recover its value from the person responsible for its destruction, if such property was not *in fact* such a menace or source of danger, the judgment or discretion vested in such officers being no protection to him, in such a case, for an invasion of the private property rights of others if they have no redress except an action against the officers. *Fath v. Koeppel,* 72 Wis. 289, so far as it conflicts, overruled. *Ibid.*

7. Uncontradicted evidence that the defendant, a health officer, made a written order directing the destruction of certain property of the plaintiff, that he gave personal directions to the deputy health officer and others who actually destroyed the property, and that such persons acted and proceeded under his order and directions, is *held* sufficient to warrant the court in answering in the affirmative a question of the special verdict as to whether the defendant caused the destruction of said property. *Ibid.*

CONSTRUCTIVE POSSESSION. See TAX TITLES, 3.

CONTAGIOUS DISEASES. See CONSTITUTIONAL LAW, 4–7.

CONTEMPT OF COURT. See WITNESSES, 3.

CONTRACT LIMITATION OF ACTIONS. See INSURANCE, 1–3, 21. LIMITATION OF ACTIONS, 2.

CONTRACTS.

See ACTIONS, 6. APPEAL, 21. BUILDING CONTRACTS. COMPROMISE AND SETTLEMENT. EVIDENCE, 8–10. FRAUD. FRAUDS, STATUTE OF. GARNISHMENT. GUARDIAN AND WARD. INSURANCE. LAND-

LORD AND TENANT. MUNICIPAL CORPORATIONS, 1, 2, 5–8. RELEASE. SALES. TELEPHONES. TRIAL, 1, 21.

Requisites and validity: Acceptance.

1. In an action for the price of a boiler furnished under a contract for a boiler of greater capacity than that actually installed, the evidence reviewed, and *held* insufficient to sustain a finding of acceptance of the boiler furnished. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 1

Same: Mutuality.

2. A contract between principal and agent, signed by both parties, by which one party, the owners of a stone quarry, appointed the other as their exclusive agent for Illinois and Wisconsin for the sale of certain described stone at prices fixed therein, and agreed to quote no prices to others without the agent's consent, is not void for want of mutuality, but at least requires the agent to act in good faith and use due diligence in bringing the principal's stone to the notice of possible purchasers for the purpose of sale to them. *W. G. Taylor Co. v. Bannerman,* 189

Same: Legality. See SCHOOLS AND SCHOOL DISTRICTS.

Construction and operation: Ambiguity.

3. Where the literal sense of the words of a contract shows no serious ambiguity, and may be taken either of two ways, one of which will render it void, and the other not, the latter is to be preferred. *Loper v. Estate of Sheldon,* 26

4. Ambiguity requiring judicial construction may as well arise from applying the contract to the subject matter thereof as from the literal sense of the word. *Ibid.*

5. In such case, in aid of determining the intention of the parties, the agreement may be considered from the precise standpoint, as regards surrounding circumstances, of the parties at the time of entering into the same, and the meaning which they subsequently, by their conduct, ascribe thereto. *Ibid.*

Same: Place of performance.

6. G. living in Wisconsin and B. living in Massachusetts, met by agreement in New York city relative to a sale of B.'s lands situated in Florida. At that time and place G., B. and the purchaser had negotiations relative to the sale of the lands on Saturday which were consummated on the following Monday. On the intervening Sunday there was made, executed and delivered to B. the promissory notes of G., made payable in Massachusetts. *Held,* that the place of the contract was the state of Massachusetts, and its laws, making void all executory contracts for the payment of money, including promissory notes, made and delivered on Sunday, governed. *Brown v. Gates.* 349

7. Where the place of performance of a contract is expressed, the presumption is that the parties contracted with reference to the law of that place. *Ibid.*

8. Where a contract is made in one state or country, to be performed in another state or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation and effect, unless it clearly appears

that the parties intended the contract should be governed by the law of the place where it was made. *Ibid.*

Rescission: Evidence.

9. In an action for the price of a boiler furnished under a contract for a boiler of a greater capacity than that actually installed, evidence of mere use of the boiler in connection with defendant's premises, with which it had been connected, is not enough to overcome evidence, in effect, that defendant, upon protesting its insufficiency, conveyed to plaintiff its wish and expectation that it be removed, and that plaintiff fully understood such election, and allowed the boiler to remain in breach of an agreement to remove it, because of an erroneous construction of the contract. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 1

Performance or breach. See DAMAGES, 1-14. EVIDENCE, 1, 2. PARTIES. PAYMENT.

10. In applying the recognized exceptions to the rule, that he who makes an entire contract can recover no compensation unless he performs it entirely and according to its terms, the question is never what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 1

11. Where plaintiff contracted to manufacture and place in defendant's factory a boiler that should be 150 per cent. of the capacity of the boiler then in use and the increase of capacity was the vital and essential part of the contract, furnishing a boiler found by the court to be about eighty-two per cent. of the capacity of the old one is in no sense substantial performance of the contract. *Ibid.*

CONTINUANCE.

A trial judge may at pleasure set aside a rule of his own making, designed to regulate the continuance of causes after being once set down for hearing, without committing reversible error, or error at all, if the rights of no one are not thereby clearly and substantially prejudiced. *Loose v. State,* 115

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 14. NEGLIGENCE, 11, 16. RAILROADS, 9.

CONVENTIONS. See ELECTIONS, 1, 3.

CONVERSION. See LANDLORD AND TENANT, 1.

CONVEYANCES. See ADVERSE POSSESSION, 1-3. COVENANTS. CROPS. DEEDS. EQUITY, 4. LANDLORD AND TENANT, 1-4. MORTGAGES. QUIETING TITLE. TAX TITLES. VENDOR AND PURCHASER. WATERS, 1. WITNESSES, 5.

CORPORATIONS.

Officers: Board of directors. See TELEPHONES.

Corporate powers and liabilities: Property and conveyances. See ELECTION OF REMEDIES.

Consolidation. See CORPORATIONS, 5.

Public service corporations. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 1, 2. RAILROADS. STREET RAILWAYS. TAXATION. TELEPHONES.

Foreign corporations. See INSURANCE, 4. TAXATION, 7.

1. While a corporation is not a citizen either of any state or of the United States within the provision of sec. 2, art. IV., Const. U. S., or the XIVth amendment thereto, and has no right, by constitutional provision or otherwise, to exercise its corporate franchises in other than its parent jurisdiction, it is the policy of this state to accord to foreign corporations, by comity, full and complete privilege to exercise their corporate franchises within the state, except so far as limitation is imposed by express legislation. *Chicago Title & Trust Co. v. Bashford,* 281
2. Sec. 1770*b*, Stats. 1898, is prospective only, and does not divest corporations which fail to comply with its terms of title to or lien on property which they, by permission of the state, had acquired prior to its enactment. *Ibid.*
3. Neither the mere passive continuance, by a foreign corporation, to hold a valid lien on or title to property in this state, acquired prior to the enactment of sec. 1770*b*, Stats. 1898, nor the commencement and prosecution of an action to foreclose such a lien, is "transacting business" within the meaning of that section and neither is prohibited thereby. *Ibid.*
4. Neither creditors of a mortgagor, who have subsequently obtained a judgment lien against the mortgaged property, nor purchasers at an execution sale to enforce such a lien, have any present right to the possession of such property, and they are in no position, in an action by the mortgagee, a foreign corporation, to foreclose its lien, to raise objection that because the corporation had failed to comply with sec. 1770*b*, Stats. 1898, it could not lawfully transact business in this state, and therefore had no right to take possession of the property under its mortgage giving such right. *Ibid.*
5. The mere transfer of the title to property in this state from one foreign corporation to another, resulting by operation of law from the consolidation of two foreign corporations, is not rendered void by failure of the corporation to comply with sec. 1770*b*, Stats. 1898, although such consolidation took place after the statute went into effect. *Ibid.*

COSTS.

See JUSTICES' COURTS, 5.

1. In an equity case costs are discretionary, and no abuse of discretion appearing, there can be no reversal of the judgment on that ground. *Malone v. Waukesha E. L. Co.* 485
2. It having been conceded on the trial that a certain class of items should be deducted from the claim set forth in the complaint, and the judgment having included such items by mistake, on an appeal taken without having called respondent's attention to such items, and given him opportunity to correct the error, appellant cannot recover costs in the supreme court, although the judgment be reduced to the proper amount by that court. *Andresen v. Upham Mfg. Co.* 561
3. On the granting of a motion for a new trial costs should be imposed upon the moving party, unless it appears that the new trial is granted upon the ground that the verdict is perverse,

or is entirely unsupported by the evidence, or by reason of a misdirection of the jury as to the law. *R. Connor Co. v. Goodwillie*, 603

4. Except in case of some express statutory provision, an extinguishment of the entire cause of action by settlement pending the action with no mention of costs extinguishes the right to costs. *Dr. Shoop Family Medicine Co. v. Schowalter*, 663

COTENANCY. See ADVERSE POSSESSION, 4.

COUNTERCLAIM. See DAMAGES, 8, 9. EVIDENCE, 1.

COUNTIES. See SHERIFFS.

COUNTY BOARD.

See APPEAL, 3, 4. CONSTITUTIONAL LAW, 3. SHERIFFS, 4–8. TOWNS.

1. County boards have power to adjourn their annual meetings, for any reasonable and sufficient grounds, both as to time and place of adjournment. *Douglas Co. v. Sommer*, 424

2. A county board having power by statute to fix the salary of the sheriff of the county, may exercise that power at an adjourned session of its annual meeting. *Ibid.*

COUNTY ORDERS. See SHERIFFS, 5.

COUNTY TREASURER. See TAX TITLES, 1, 2.

COURT AND JURY. See APPEAL, 24. CONSTITUTIONAL LAW, 7. CRIMINAL LAW, 3, 7, 8. FRAUD, 3. MASTER AND SERVANT. RAILROADS, 2. STREET RAILWAYS. TRIAL, 10.

COURT COMMISSIONERS. See HABEAS CORPUS.

COURTS.

See ACTIONS, 5. COMPROMISE AND SETTLEMENT, 2. HABEAS CORPUS. JUSTICES' COURTS. SUPREME COURT.

1. Where, in an action against receivers of a railroad, appointed by a federal court, to compel the removal of obstructions from certain streets the title to which was claimed by defendants, the action had been removed to the federal court, and the federal court had assumed jurisdiction and retained the same after a motion to remand to the state court, the state court can properly take no proceedings in the action while the cause is still proceeding in the federal court. *Ashland v. Whitcomb*, 549

2. In such case, the ultimate authority to decide finally and conclusively upon the question of jurisdiction is in the federal court, and the state court will respect its determination in any case covered by the federal removal statute. *Ibid.*

COVENANTS.

See LANDLORD AND TENANT, 1, 4.

1. E., the holder of certain tax deeds and certificates, conveyed to M., the holder of the original title, by warranty deed. E. afterwards obtained a tax deed under a tax certificate he held at the time of such conveyance. *Held*, that such interest as E. acquired under such tax deed inured to M. under E.'s deed. *Myrick v. Kahle*, 57

2. M., the holder of the original title to certain lands, had acquired the interest therein of E., the holder of certain tax titles, by a conveyance containing covenants of warranty. E. afterwards obtained other tax titles which inured to the benefit of M. under such covenants. *Held*, that such facts established sufficient title in M. to enable him to maintain an action to set aside tax deeds held by third parties. *Ibid.*

CREDIBILITY. See CRIMINAL LAW, 6. EVIDENCE, 7.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime in general. See FALSE PRETENSES. HOMICIDE. RAPE.

Indictment and information. See FALSE PRETENSES, 2.

Evidence: Materiality and competency.

1. An apparent motive for the commission of a criminal offense is not an essential to a conviction thereof. Mere proof of motive does not of itself establish guilt, nor proof of want of motive establish innocence. Such proof is entitled to just such consideration in arriving at the truth of the matter as the jury think ought to be given thereto; and the same principle governs in respect to proof of the character of the accused prior to the time of the alleged commission of the offense inconsistent with the truth of the charge. *Cupps v. State*, 504

2. If a jury, upon the whole evidence produced for their consideration in a criminal case, believe the accused guilty beyond a reasonable doubt, it is their duty to so find, regardless of whether they can discover therein an adequate or any motive for the commission of the offense; and also regardless of whether they believe that the character of the accused before such commission was inconsistent therewith. *Ibid.*

Trial: Province of court and jury.

3. In a criminal case it is not error to say in the presence of the jury, in effect: A cause for arrest does not indicate any cause for conviction. When a person is duly charged in such a cause and placed upon his trial it is presumed to have been regularly done, but does not furnish any reason to be considered by the jury as regards the fact of guilt. *Loose v. State*, 115

Same: Necessity, requisites and sufficiency of instructions. See FALSE PRETENSES, 3, 4.

4. The court having instructed the jury in a criminal case that they should acquit the accused unless satisfied of his guilt from the evidence beyond every reasonable doubt, is not required, whether requested or not, to give further instructions on the same subject. *Loose v. State*, 115

5. An instruction that "a reasonable doubt which entitles an accused person to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case," taken in connection with the remainder of the charge, is *held* to have conveyed to the jury with sufficient clearness the rule that they must acquit unless the evidence overcomes all reasonable doubt, although the use of the expression "which entitles an accused person to an acquittal" is disapproved. It would be better to instruct in that regard that the doubt should arise from a consideration of all the evidence *or want of evidence*. *Baker v. State*, 135

6. In a criminal prosecution the jury have a right to consider the prior criminality of the accused only as bearing on his credibility where he is a witness on his own behalf, but subject to the exception, however, that in cases where a specific intent is an essential element of the crime (such as the intent to defraud in a prosecution for obtaining money under false pretenses), other similar acts so closely connected with that charged as to tend directly to show the intent characterizing the latter may be proved for that purpose. *Ibid.*

7. In giving instructions to a jury in a criminal trial, it is not reversible error for the judge to speak of facts as established in the cause which are so beyond any room for reasonable debate. *Cupps v. State,* 504

8. If a trial judge, in charging a jury in a criminal case, makes an incorrect recital of a fact as to whether it is established or not, if the evidence is all one way and so plain that there is no room in reason for the jury to misunderstand it notwithstanding the incorrect statement, the language of such recital being reasonably harmonizable with the truth of the matter, such mistake does not constitute reversible error. *Ibid.*

9. In a prosecution for murder in the first degree, if the evidence in the judgment of the trial judge in any reasonable view thereof will not warrant a verdict of any other homicidal offense than that of murder in the first degree, it is his duty to so instruct the jury. *Ibid.*

10. While it is the duty of the judge, in a prosecution for a homicidal offense, to instruct the jury as to every degree thereof to which the evidence, in any reasonable view of it, will apply, a failure so to do of his own motion does not constitute reversible error. *Ibid.*

11. An exception to the charge, in a prosecution for murder in the first degree, that the accused should, on the evidence, be convicted of the full offense charged against him or acquitted, does not preserve for review the question of whether instructions should have been given as to other degrees of homicidal offenses. *Ibid.*

12. The rule applies in criminal as well as in civil cases, that failure to instruct the jury upon a material point is not reversible error unless a written request to charge upon such point, in proper form to be given to the jury, is seasonably presented to the trial judge and the request is refused. *Ibid.*

13. The court having charged the jury, in a prosecution for murder, that they should weigh the evidence of each witness "as best they can," and in the performance of the duty of "scrutinizing the evidence and determining its effect, you should exercise the utmost caution, employ all the reason, prudence, judgment and discrimination that you possess and would summon to your own aid in the most important affairs of life," it is not error to refuse to instruct that in performing such duty, the jury should use "the utmost care, caution," etc. *Ibid.*

14. It is not error to refuse to instruct the jury in a criminal case that, "unless you can say from that standpoint that the evidence fails to impress your minds with any reasonable doubt of the defendant's guilt, you should acquit the accused and

render a verdict of not guilty," because, if the idea involved is not clearly erroneous, the language is fatally ambiguous. *Ibid.*

15. The inclusion of a request to charge the jury as indicated in the preceding paragraph would render the entire request fatally defective. *Ibid.*

16. The proper instruction, in substance, to give to the jury on the subject covered by the two last foregoing paragraphs is that, after giving to the evidence the consideration indicated by the instructions mentioned in paragraph 14, there then remains in the minds of the jury no reasonable doubt of the defendant's guilt they should convict him, otherwise they should acquit him. *Ibid.*

Review: Form of remedy: Jurisdiction. See HABEAS CORPUS.

CROPS.

See LANDLORD AND TENANT, 1–4.

Crops, such as vegetables, which require to be planted or sown annually are no part of the realty, and the mere sale of such growing crops operates to sever it from the realty so that they will no longer be included in a conveyance of the land. *Simanek v. Nemetz,* 42

CRUEL AND UNUSUAL PUNISHMENTS. See RAPE, 3.

CULVERTS. See HIGHWAYS, 15.

CUSTOM AND USAGE. See DAMAGES, 8.

DAMAGES.

Nature and grounds in general. See CONSTITUTIONAL LAW, 6. EVIDENCE, 1. FRAUDS, STATUTE OF, 2. LANDLORD AND TENANT, 5–12. MUNICIPAL CORPORATIONS, 9, 11–14. REPLEVIN, 5. SHERIFFS, 5.

1. In an action founded upon breach of contract motive cannot create or increase liability for damages. *Kelley, Maus & Co. v. La Crosse Carriage Co.* 84

Mitigation. See BUILDING CONTRACTS, 2, 3.

Measure of damages: Breach of contract. See BUILDING CONTRACTS, 2, 3. LANDLORD AND TENANT, 5–12.

2. In an action for the price of a boiler furnished under a contract for a boiler of greater capacity than that actually installed, the contract price is not *prima facie* proof of its value. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.* 1

3. In such case, testimony by defendant's manager, in effect, that if a boiler, such as contracted for, was worth $2,035, the value of such a one as delivered was proportionally less as the capacity, but said, "I can't state the market value of that boiler at the time I received it any more than what Mr. H. (plaintiff's witness) valued it at," cannot be construed into an admission that the market price was as much as H.'s valuation. *Ibid.*

4. Where plaintiff contracted to deliver to defendant at a specified date certain vehicle springs, but failed to deliver any except a very small quantity until months after the contract date, if

defendant, upon ascertaining the breach, with ordinary diligence could have promptly obtained springs such as those specified in the contract in the open market, he can recover, as general damages, the difference between the price at which he could have so obtained them and the contract price, together with such special damages as he must nevertheless have suffered, including necessary expenses in finding and procuring other springs, or in his efforts, consistent with reasonable prudence and diligence, to expedite delivery of the contract springs. *Kelley, Maus & Co. v. La Crosse Carriage Co.* 84

5. Where plaintiff contracted to deliver to defendant by an agreed date certain vehicle springs which had to be manufactured before they could be furnished, and defendant relied on plaintiff's frequent assurances that the springs would be shipped soon, and probably earlier than the springs could be manufactured elsewhere, plaintiff cannot complain because defendant omitted efforts to buy springs which had to be manufactured before furnished, if such would be the conduct of ordinarily prudent persons under those circumstances *Ibid.*

6. In such case, if it appeared that springs, such as defendant contracted for, were not purchasable in the open market, or were of designs specially adapted for defendant's vehicles and obtainable only by special order, and that, by plaintiff's failure to deliver at the agreed time, defendant was prevented from producing the number of vehicles which, but for plaintiff's delay, defendant's factory would, with reasonable certainty, have produced; that defendant, with reasonable certainty, would have been able to have sold such output during the then current season, and that plaintiff had knowledge of such facts with reference to defendant's business, or of the vehicle manufacturing business generally, that plaintiff as a reasonable man should have contemplated such injury might probably result from such breach,—then defendant would be entitled to recover the value of the lost use of defendant's whole establishment as measured by comparison of its output according to its capacity under usual circumstances and its output as impaired by plaintiff's default, and in addition the expenses of reasonable efforts to expedite shipments under the contract, after plaintiff's default became apparent, and also the reasonable expenses of efforts to find and purchase springs from others to supply the place of those plaintiff failed to deliver on time, together with the increased cost of springs so purchased. *Ibid.*

7. The rule that one who breaks a contract is liable to compensate the other party for all damages occasioned by the breach which might reasonably be expected to flow therefrom, does not require that the party breaking the contract should know in detail just what constitutes the loss, provided it be reasonable and within usual experience. *Ibid.*

8. Plaintiff contracted with defendant, who had an established business as manufacturer of vehicles, to deliver at an agreed date certain vehicle springs for use in the manufacture of defendant's vehicles, but failed to do so until long after the agreed date, and long after the then current season of defendant's business closed. In an action for the contract price, defendant counterclaimed for damages to its business through

such non-delivery. *Held*, that it was error to exclude evidence offered by defendant on its counterclaim on the following subjects:

(a) Evidence tending to prove even general knowledge on plaintiff's part of how the vehicle business was carried on, either in manufacturing, selling or obtaining the necessary supplies of material, and whether such knowledge was derivable from plaintiff's general familiarity with the vehicle business, or from facts communicated to plaintiff at or prior to the time of making the contract.

(b) Evidence of the custom of operating defendant's factory, tending to show the manner in which, and extent to which, non-supply of springs interrupted its operation and diminished its efficacy.

(c) Evidence of the actual effect of absence of springs after the time at which the plaintiff was bound by contract to make delivery.

(d) Evidence of the capacity of the factory during the period of complete or partial interruption after the springs were due, but confined, however, to that which was ordinary and usual.

(e) Evidence tending to show that defendant had sufficient supply of material and parts of vehicles—other than springs—and of labor to keep its factory running to an extent not exceeding that which was usual and customary.

(f) Evidence to prove the fact of sales in excess of what the factory was able to produce with the shortage of springs, and for that purpose the orders received, either before or after the contract, were relevant, provided they did not exceed such as should have been within the reasonable contemplation of the parties.

(g) Evidence as to whether a market existed from which the defendant, with reasonable diligence, could have supplied itself promptly enough to have avoided other damage by merely paying some enhanced price for springs. In this is involved testimony that springs in quantity for factories, such as defendant's were ordinarily obtainable only by contract long enough in advance to enable manufacture; also description of springs contracted for, to the extent of showing whether they were peculiar in any of their details, so as to be especially adapted to the types of vehicles manufactured by defendant.

(h) Evidence to show the diligence exercised by defendant, after it had reasonable ground to believe plaintiff would default in seasonable delivery, in the way of attempting to obtain springs elsewhere or to expedite the shipments from plaintiff's place of manufacture, and therein to show representations and promises on the part of plaintiff which might have induced defendant to forego efforts which it might otherwise have made.

(i) Evidence as to the expenses incurred by defendant in reasonably diligent efforts to obtain springs after it had ascertained plaintiff's default to furnish the springs within the time limit of the contract. *Ibid.*

9. Plaintiff contracted with defendant, who had an established business as manufacturer of vehicles, to deliver, at an agreed date, certain vehicle springs for use in the manufacture of defendant's vehicles, but failed to do so. In an action for the contract price defendant counterclaimed for damages through such nondelivery. *Held*, that it was error to admit evidence offered by defendant on the following subjects:

(a) Evidence of the money value of the time of defendant's employees lost by reason of nondelivery of such springs. It is not a proper specific element of recovery.

(b) Evidence of profits on the specific vehicles included in orders received by defendant which it was unable to fill by reason of plaintiff's failure to furnish such springs.

(c) Letters between defendant and the company at whose factory plaintiff was having the contract springs manufactured, except as bearing on defendant's diligence.

(d) Evidence tending to show wilfulness of the plaintiff in its breach of the contract. *Ibid.*

10. In an action by the agent to recover damages for breach of a contract, it appeared that the principal sold stone to others at the contract price, and that the agent offered to sell the same stone to the same parties at the same price. *Held*, that the agent was not damaged by the sale. *W. G. Taylor Co. v. Bannerman*, 189

11. By a written agreement the agent in such a case consented to the sale of a certain quantity of stone to a third party at a fixed price "in consideration of certain conditions," and it was shown by other evidence that the consent was granted upon the understanding that the purchaser had worked up certain private jobs of paving, as distinguished from ordinary city contracts, and had an unexpired contract with the principal for stone. *Held*, that the permitted sales were limited to such purposes only, and that the agent was entitled to damages for all sales made by the principal to such purchaser which were used for purposes outside of such understanding. *Ibid.*

12. After having filled part of an order made by an agent under a contract with a third person, the principal refused to supply any more stone on the ground that the agent had failed to pay him $600 due for stone already shipped. At that time the agent had a well founded claim against the principal for damages for breach of the contract amounting to more than the sum due. The agent was unable to obtain the stone elsewhere, and the purchaser thereupon cancelled the contract. *Held*, that the principal was liable to the agent for the profits lost by reason of the failure to supply the stone. *Ibid.*

13. Where a principal contracts with an agent to sell to or through the agent the entire output of a stone quarry, and the principal sells the entire output to a third party, and the agent has also taken orders sufficient to absorb it all, the agent cannot recover the difference between the contract and market price upon that sold by the principal, and, in addition, recover the difference between the contract and sale price on that for which the agent had taken orders. *Ibid.*

14. The damages recoverable for breach of contract are such as may fairly and reasonably be considered the natural and proximate result thereof, and in the light of circumstances, special or otherwise, known to both parties at the time of making the contract, may reasonably be supposed to have been in contemplation by them as the probable result of such breach. *Gross v. Heckert*, 314

Same: Injuries to the person: Excessive damages. See RAILROADS, 5.

15. In an action for personal injuries sustained by a fall on a defective sidewalk, where it appeared, among other things, that

plaintiff sustained a severe shock to his nervous system, attended by fever; that he endured much pain and general impairment of health; that he was confined to the house about a month, and that he incurred liability for medical attendance of $125, a verdict of $750 is *held* not to be excessive. *Ruscher v. Stanley,* 380

DAMS. See DEEDS.

DEBTOR AND CREDITOR. See GARNISHMENT. REPLEVIN.

DECEIT. See FALSE PRETENSES. FRAUD.

DECLARATIONS. See INSURANCE, 4.

DEEDS.

See ADVERSE POSSESSION, 1–3. COVENANTS. CROPS. EQUITY, 4. LANDLORD AND TENANT, 1–4. TAX TITLES. WATERS, 1. WITNESSES, 5.

1. A deed of land bounded by a millpond which is the mere enlargement of a river passes the land to the thread of the stream. *Lawson v. Mowry,* 52 Wis. 219, and *Fox River F. & P. Co. v. Kelley,* 70 Wis. 287, distinguished. *Roberts v. Decker,* 102

2. R. C. P., the owner of a milldam and waterpower on a stream, and of the land on both sides thereof, conveyed to J. N. P. and S. a fifteen-rod strip covering the west bank opposite the dam for some distance above and below, together with 1,500 inches of water under a five-foot head, and the grantees covenanted to defray half of the expense of maintaining the dam so as to keep up a five-foot head of water. It appeared that 1,500 inches of water under a five-foot head was more than half of the ordinary flow of the river. At the time of said conveyance there was a sawmill on the east side of the stream. Four months later R. C. P. conveyed to F. C. W. an undivided one third of the land on the east side of the river (the sawmill property) "together with the equal undivided one third of the sawmill situated on the above-described real estate and the equal undivided one third of the dam, waterpower, privileges and appurtenances thereunto belonging or in any wise appertaining." The next year R. C. P. made a conveyance to F. C. W. containing the same description as that in the last mentioned deed, except that the fraction one sixth was used instead of one third. F. C. W. conveyed to G. using the same description but substituting therein the fraction one half. Subsequently R. C. P. conveyed to S. and S. to G. the other half of the same described property. Thereafter G. conveyed to J. W. W. the land on the east side of the river "together with the sawmill situated on the above-described real estate and the equal and undivided one half of the dam, waterpower, privileges and appurtenances thereunto belonging or in any wise appertaining," and the property covered by such conveyance vested by mesne conveyances in defendants, who also by mesne conveyances acquired the title to the 1,500 inches of water under a five-foot head "together with all rights and privileges in and to the water power dam and flowage," etc., conveyed to J. N. P. and S. Several years later G. quitclaimed to plaintiff the undivided one half of said dam, together with the waterpower, etc., thereunto belonging. *Held:*

(1) The deed from R. C. P. to J. N. P. and S. conveyed the land to the middle of the stream, and insured to the grantees the use of the specified amount of water at all times, whether one half of the flow equaled that amount or not.

(2) The deeds from R. C. P. to F. C. W. referred to the east half, and not to the whole, of the dam and waterpower, and conveyed to him an undivided one half interest therein.

(3) The deed from G. to J. W. W. conveyed to the latter all of the former's interest in the dam and power, as well as in the sawmill. *Ibid.*

3. In such a case, undisputed evidence that in 1874 G. was dispossessed of the entire property on the east side of the river by J. W. W., claiming under his deed, and that thereafter J. W. W. and his grantees had been in actual, exclusive adverse possession claiming title under such deed, and that until 1901 no one made any claim of title to the dam or waterpower, is *held* conclusive proof of adverse possession under the ten-year statute of limitations. *Ibid.*

DEFAULT. See FRAUDS, STATUTE OF, 6.

DEFECTS. See FRAUD, 5. HIGHWAYS, 10–14.

DEFINITIONS. See WORDS AND PHRASES.

DEMAND. See FRAUDS, STATUTE OF, 3. PAYMENT, 1.

DEMURRER. See ACTION, 6. ADVERSE POSSESSION, 1, 2. INFANTS. QUIETING TITLE, 2–5. RELEASE.

DILIGENCE. See DAMAGES, 8, 9. FRAUD, 3.

DIRECTION OF VERDICT. See APPEAL, 10. CRIMINAL LAW, 9. HIGHWAYS, 13. INSURANCE, 1. MUNICIPAL CORPORATIONS, 6. NEGLIGENCE, 1, 11. RAILROADS, 7, 9. STREET RAILWAYS.

DIRECTORS. See TELEPHONES, 2.

DISAVOWAL. See ACCORD AND SATISFACTION, 3, 4.

DISCONTINUANCE. See HIGHWAYS, 3–9.

DISCRETION. See APPEAL, 1, 2, 11–15. CONSTITUTIONAL LAW, 6. CONTINUANCE. COSTS, 1. EQUITY, 2. EXECUTORS AND ADMINISTRATORS, 1. JUSTICES' COURTS, 5. TRIAL, 2. WILLS, 1. WITNESSES, 1.

DOCKET. See JUSTICES' COURTS, 2, 3, 6.

DOCUMENTARY EVIDENCE. See EVIDENCE, 6, 7.

DRUGGISTS. See NEGLIGENCE, 4–6.

ELECTION OF REMEDIES.

See INSURANCE, 4.

In an action by one telephone company against another to recover the value of the plant of the former alleged to have been sold to the latter, it is not error to refuse to require the plaintiff to elect whether it will go to trial upon a count based upon *quantum meruit*, or upon a count alleging that defendant agreed to make payment therefor in a certain number of shares of its capital stock, and that it had failed and refused to deliver such stock, or pay the value thereof in cash. *Badger Telephone Co. v. Wolf River Telephone Co.* 169

ELECTIONS.

1. Under ch. 341, Laws of 1899, entitled "*An act relating to caucuses* and amending" secs. 11*a*–11*i*, Stats. 1898, nominations by mass conventions, provided for by sec. 30, Stats. 1898, were not abolished by the general repealing clause contained in ch. 341, Laws of 1899, and a person so nominated, whose name appeared upon the official ballots and who received a majority of all the votes cast for the office for which he was a candidate, was duly elected and entitled to hold the office. *State ex rel. Hunt v. Stafford,* 203

[2. Whether ch. 341, Laws of 1899, is constitutional, not determined.] *Ibid.*

[3. MARSHALL, J., is of the opinion that the provision of sec. 30, Stats. 1898, authorizing nominations by mass conventions has been repealed by ch. 341, Laws of 1899, but that the constitutional right of an elector to participate with effect in elections, so far as having his choice of candidates regarded, is so far removed from legislative interference that he cannot rightfully be required, by any legislative act, to use a particular form in a particular way for indicating his choice, and thereafter have that choice disregarded because of its being in favor of one whose name was not rightfully on the ballot form placed, by public agencies, in his hands as correct.] *Ibid.*

ELECTORS. See ELECTIONS, 1, 3.

ELECTRIC LIGHT POLES. See EMINENT DOMAIN, 4. MUNICIPAL CORPORATIONS, 1.

ELECTRIC RAILWAYS. See EMINENT DOMAIN. STREET RAILWAYS.

EMINENT DOMAIN.

1. A street railway incorporated under ch. 86, and secs. 1862, 1863, of ch. 87, Stats. 1898, operating under ordinances forbidding use for any other purpose than that of a passenger railway within the streets of the city, except carrying such personal effects as are usually carried by passengers on street railways, and limiting the fare to be charged for each passenger, has the right to maintain its tracks and railway on the city streets, for the purpose of doing a legitimate street-railway business, without making compensation to abutting lot owners. *Younkin v. Milwaukee L., H. & T. Co.* 477

2. Defendant operated interurban trains and cars over country highways between two cities, thence on its street-railway tracks through one city over a street to its limits, and thence over country highways to a point six or seven miles distant. *Held,* that the running of such interurban trains and cars over the street-railway tracks was an additional burden upon the lands of lot owners abutting on the streets so used. *Ibid.*

3. Prior to the enactment of ch. 465, Laws of 1901, street railways had no right to condemn land in the streets of cities and villages. In an action commenced before that enactment it was *held,* that the only adequate remedy of abutting lot owners was to enjoin the unlawful casting of additional burdens on their premises. Such decision is limited, however, to the conditions at the time the action was commenced. *Ibid.*

[4. Whether the placing of poles in a street by an electric lighting corporation for the purpose of placing electric light and heat wires thereon is an additional burden to the fee, so as to require condemnation proceedings, as against the abutting owners, not determined.] *Malone v. Waukesha E. L. Co.* 485

ENCROACHMENT. See RES ADJUDICATA, 2, 3.

ENTIRE CONTRACTS. See CONTRACTS, 10, 11. GARNISHMENT, 1.

EQUITY.

See ACTION, 1, 2, 7. ARBITRATION. ATTORNEY AND CLIENT. COMPROMISE AND SETTLEMENT, 2. COSTS, 1. EMINENT DOMAIN, 3. MUNICIPAL CORPORATIONS, 1. QUIETING TITLE, 1. RES ADJUDICATA, 3. VENDOR AND PURCHASER, 1, 3, 4. WATERS, 2.

1. In equity the mere fact that the complaint demands judgment for relief to which plaintiffs are not entitled is no ground for refusing the relief to which they are entitled. *Younkin v. Milwaukee L., H. & T. Co.* 477
2. Where a city has general power to cause streets to be improved at the expense of a private owner, and the amount assessed is not more than his proper share of the reasonable cost of such improvement, if from irregular exercise of that power, or other cause, not affecting adversely the burden imposed on him, the imposition be illegal or invalid, the private owner must find his remedy under the strict rules of courts of law, and a court of equity will, in the exercise of its discretion, refuse him its peculiar forms of relief. *Beaser v. Barber A. P. Co.* 599
3. Influence or importunity, to be undue, must destroy, or at least impair or prevent, free agency. *Drinkwine v. Gruelle,* 628
4. In an action to set aside a deed and mortgage alleged to have been obtained by fraud and undue influence, the evidence examined, and *held* not to sustain findings of undue influence. *Ibid.*
5. In such cases, the judgment is not to rest on mere suspicion or assumption, or on findings that rest largely upon the existence of ill feeling and opportunity to stimulate ill feeling. *Ibid.*

ESTABLISHMENT. See HIGHWAYS, 1, 2.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS. FRAUDS, STATUTE OF, 1, 2. WILLS.

ESTOPPEL. See ACCORD AND SATISFACTION, 3, 4. INSURANCE, 10, 11, 21. LANDLORD AND TENANT, 4. TELEPHONES, 2. TRIAL, 16.

EVIDENCE.

See WITNESSES.

Presumptions. See APPEAL, 8, 9. CONTRACTS, 7. FRAUDS, STATUTE OF. HIGHWAYS, 4. HOMICIDE, 2. MUNICIPAL CORPORATIONS, 7. NEGLIGENCE, 10. WATERS, 1.

Burden of Proof. See ATTORNEY AND CLIENT, 1. BUILDING CONTRACTS, 3. HOMICIDE, 4.

Relevancy, materiality and competency. See ACCORD AND SATISFACTION, 1, 3, 4. ADVERSE POSSESSION, 3. APPEAL, 16, 25, 26, 28. CRIMINAL LAW, 1, 2. DAMAGES, 8, 9, 11, 13, 14. FALSE PRE-

TENSES, 5-9. INSURANCE, 5-7, 17. LANDLORD AND TENANT, 1, 2, 7-12. MUNICIPAL CORPORATIONS, 13. NEGLIGENCE, 5, 13. RELEASE. REPLEVIN, 1, 4, 5. SALES, 2, 3. TAX TITLES, 2.

1. Defendant counterclaimed for damages for breach of a contract, confessedly made at a certain date, in failure to supply the contracted articles at the contract date. There was no allegation of a contract later than or different from the one admitted to have been made. *Held*, that evidence that at a later date the parties entered into a new agreement, upon consideration that defendant would refrain from supplying itself elsewhere, and at that time there was communicated to plaintiff additional and specific information of the injury to defendant which would follow a breach of the contract, was irrelevant. *Kelley, Maus & Co. v. La Crosse Carriage Co.* 84

2. In an action for the value of goods alleged to have been delivered to a third person at defendant's request, the evidence examined, and a finding, that defendant was the purchaser of the goods delivered by plaintiff, is *held* to be against the clear preponderance of the evidence. *Andresen v. Upham Mfg. Co.* 561

Best and secondary evidence. See HIGHWAYS, 3.

3. Where evidence had been given of the receipt by defendant of a letter from plaintiff, referred to in another letter received in evidence, that it was lost, and that after diligent search it could not be found, it is competent for defendant to prove its contents by a witness who had seen it. *Kelley, Maus & Co. v. La Crosse Carriage Co.* 84

4. In such case, nothing appearing to show that such letter was in plaintiff's custody, notice to plaintiff to produce it is not essential. *Ibid.*

5. A family record is not the best evidence of a birth noted therein, nor original evidence in respect thereto, the person who made the record being alive, competent to testify, and within reach of the court. In such a case such record is of no higher dignity than any other memorandum. *Loose v. State,* 115

Admissions. See FALSE PRETENSES, 9.

Declarations. See INSURANCE, 4.

Documentary evidence: Private writings and memoranda. See DAMAGES, 9. EVIDENCE, 3-5.

6. The maker of a memorandum, or person who knew at some time that it was made correctly, may use the writing in or out of court to refresh his memory preparatory to testifying in respect to the matter therein referred to, and after doing so may so testify though having no present knowledge as to the truth of such matter independently of the writing. *Loose v. State,* 115

7. The fact that the witness, in the circumstances above stated, fails to produce the memorandum in court, gives no ground for rejecting his testimony, unless he unreasonably refuses to produce it pursuant to the court's order. Absence of the writing can be considered as bearing on the credibility of the witness to such extent as the jury think proper under all the circumstances. *Ibid.*

Parol or extrinsic evidence affecting writings. See LANDLORD AND TENANT, 2.

8. A writing—"Received $200 from S. to balance boiler account in full"—is a mere receipt, and parol evidence of a contemporaneous agreement that the boiler installed should remain in place for the purpose of giving the contractor an opportunity to remedy any defects and the purchaser to ascertain whether it satisfied the contract of purchase, is admissible. *Seeger v. Manitowoc Steam Boiler Works,* 11

9. It is competent to show by parol evidence that an assignment of a lease, absolute on its face, was given as security only. *Gross v. Heckert,* . . . 314

10. Where one person, on purchasing property of another, agrees to apply the consideration in part payment of the debts of the latter, but the written memorandum fails to fully specify all the stipulations made as to the debts assumed, it may be shown by parol testimony what debts the purchaser agreed to pay. *Fosha v. O'Donnell,* 336

Opinion evidence. See MUNICIPAL CORPORATIONS, 14.

Weight and sufficiency. See APPEAL, 23. BOUNDARIES, 6. BUILDING CONTRACTS, 2, 4, 5. CHATTEL MORTGAGES. COMPROMISE AND SETTLEMENT, 3. CONSTITUTIONAL LAW, 7. CONTRACTS, 1, 9. CRIMINAL LAW, 3. DAMAGES, 2, 3, 10, 12. EQUITY, 3–5. FALSE PRETENSES, 5–9. FRAUD, 1, 2. HIGHWAYS, 1, 13. HOMICIDE, 3. INSURANCE, 2–8. LANDLORD AND TENANT, 1, 7–12. MUNICIPAL CORPORATIONS, 7, 12, 14. NEGLIGENCE, 4, 8–11, 14. NEW TRIAL, 1, 2. QUIETING TITLE, 1, 4, 5. RAILROADS, 3. RAPE, 4–6. REPLEVIN, 1. STREET RAILWAYS. TAXATION, 3.

EXCEPTIONS. See APPEAL, 6–10, 16, 17. CRIMINAL LAW, 11.

EXCESSIVE DAMAGES. See DAMAGES, 15. RAILROADS, 5.

EXECUTIONS. See TAXATION, 10.

EXECUTORS AND ADMINISTRATORS.

1. The right of administration of a decedent's estate is not inherent, but statutory, and may be given or withheld in the discretion of the legislature. *Welsh v. Manwaring,* 377

2. The provisions of sec. 3807, Stats. 1898, that administration shall be granted to the widow, surviving husband, or next of kin, or to the person whom such relatives may request to have appointed, if suitable and competent to discharge the trust, is mandatory, and in itself declares its only exceptions. *Ibid.*

3. By subd. 2, of said sec. 3807, the right of the next of kin, etc., is limited to the case where the application is made within thirty days after the death, and when he or the person nominated is suitable. Plaintiff, a nonresident of Wisconsin, and a half-brother of decedent, within thirty days after the death, applied for administration to be granted to his nominee, a suitable person. The court denied the application, and, on application of creditors, appointed the public administrator to the office. *Held,* that plaintiff was absolutely entitled to have his nominee appointed, and the refusal was error. *Ibid.*

4. In such case, the power to appoint the public administrator to the office of administrator is limited by sec. 3819, Stats. 1898, until administration "shall, upon proper application of some

person entitled to apply therefor, be granted to some other person." *Ibid.*

EXECUTORY CONTRACTS. See CONTRACTS, 6.

EXPERT TESTIMONY. See MUNICIPAL CORPORATIONS, 14.

FACTORS.

1. "An agent employed to sell, or to purchase and sell, goods or other personal property intrusted to his possession, for commission, is a factor." *Beardsley v. Schmidt,* 405
2. It is not essential to the relation of an agent to his principal in respect to the latter's property, that it should have been consigned directly to him by such principal, in order to give such agent the status of a factor. It is only necessary that the agent shall be possessed of the property with authority from the principal to sell the same on commission. *Ibid.*
3. By common-law principles a factor has a special property in goods intrusted to his care and in the proceeds of a sale thereof, from which, by implication, arises authority to sell the property in his own name, and to likewise sue to recover the purchase price. *Ibid.*
4. As between a factor and his vendor, the former is the owner of the subject of the sale and real party in interest to sue to recover the purchase price, that not being affected, necessarily, by whether the name of the principal is disclosed to the vendee before the sale, or the terms of the sale are submitted to the principal for approval, or the sale is in fact made in the name of the factor. *Ibid.*
5. A factor or person possessed of the goods of another and authorized in respect thereto to make a contract for the benefit of his principal, is trustee of an express trust under sec. 2607, Stats. 1898, and authorized thereby to enforce it in his own name, whether so made or not, such statute expressly providing that he shall be such trustee if the contract is *made with him* or in his own name. *Ibid.*
6. Whether the right of a factor to sue in his own name be referred to common-law principles or the statute mentioned, the principal may control the litigation, saving the rights of the factor, unless the latter's legitimate charges against the subject of the action exceed the amount recoverable. *Ibid.*

FALSE PRETENSES.

See FRAUD.

1. Sec. 4423, Stats. 1898, prohibits and punishes as well the fraudulent obtaining of money or goods for an ostensibly charitable purpose as for any other. *State v. Crowley,* 41 Wis. 271, limited and explained. *Baker v. State,* 135
2. In such case, an information which, after enumerating the representations claimed to have been made by the accused, alleged that each of such representations was not a fact, "all of which the accused then and there well knew," is *held* a sufficient allegation of knowledge on the part of the accused of the falsity of the statements charged against her. *Ibid.*

3. In a criminal prosecution for obtaining money by falsely representing that the accused was collecting money for an orphan asylum, an instruction to the effect that a boarding house or place where children were taken care of for hire, and in which no element of charity entered, cannot be considered an "orphans' home" as the term would ordinarily be understood by persons who are solicited for charitable donations for the support of such an institution, as qualified in other parts of the charge, is *held* not to have been erroneous. *Ibid.*

4. In such case, an instruction that the jury might reach a verdict of conviction if any of the material representations were found to have been made and to be untrue, with the other necessary qualifications, is *held* not to have been erroneous. The false statements established, however, must have been material in the sense that they of themselves, without aid from those which were not proved, induced the accuser to part with his goods or money. *Ibid.*

5. In a prosecution for obtaining money by falsely representing that the accused was collecting money for the support of an orphan asylum maintained by her, evidence of conversations between the accused and two witnesses, which took place in another state some six months before the offense in question, in which she made statements concerning an orphan asylum quite different in detail from, though having some general similarity to, those made to the prosecuting witness, without a showing that such statements were in any way connected with an intent to obtain money from or defraud those to whom they were made, or that the place then maintained by the accused was the same as the one in existence when the alleged offense was committed, and evidence that the place as described in said conversations was materially different from the place the accused actually maintained, is *held* too remote to be admissible as tending to show fraudulent intent. *Ibid.*

6. Evidence more or less derogatory to the accused, descriptive of an establishment maintained by her a year and a half before the offense for which she was on trial, and also of an establishment maintained for several months prior to that offense, both establishments being different from that maintained at the time of the offense, is *held* erroneously admitted. *Ibid.*

7. Evidence of transactions with and communications from the husband of the accused, not in her presence, the tendency of which was to show a purpose of himself and the accused to apply to their own private accumulations the money obtained by them from contributions for the orphan asylum and not to devote them to the care of the orphans, is *held* inadmissible. *Ibid.*

8. Testimony of a witness as to the conduct of herself and others who were soliciting aid for the orphanage of the accused, in the absence of and without anything to show the accused's connection therewith, is inadmissible. *Ibid.*

9. Evidence derogatory to the accused, such as admissions that she did not dare to collect money due her from her sister because the latter knew facts to her disadvantage and threatened to expose her, evidence of rumor in the community and recollections of the contents of public records in connection with her marriage, are prejudicial and should have been excluded. *Ibid.*

FAMILY RECORD. See EVIDENCE, 5.

FEDERAL COURTS. See COURTS.

FEES. See CONSTITUTIONAL LAW, 3. COUNTY BOARDS, 2. SHERIFFS, 2-8.

FELLOW SERVANT. See RAILROADS, 8.

FENCES. See ACTIONS, 1, 2. HIGHWAYS, 1, 8. RES ADJUDICATA, 2, 3.

FILING. See CHATTEL MORTGAGES, 2, 3. MORTGAGES, 1.

FINDINGS. See APPEAL, 23. EQUITY, 3-5. TAXATION, 10. TRIAL, 21.

FIRE ARMS. See NEGLIGENCE, 1-3.

FIRE INSURANCE. See INSURANCE, 8-21.

FORECLOSURE. See CORPORATIONS, 4. MORTGAGES.

FOREIGN CORPORATIONS. See CORPORATIONS. INSURANCE, 4. TAXATION, 7.

FOREIGN STATUTES. See ACTIONS, 3-5.

FORFEITURE. See ACTIONS, 1, 2. INSURANCE, 14-16. RES ADJUDICATA, 2. VENDOR AND PURCHASER, 1.

FORMER ADJUDICATION. See APPEAL, 29. RES ADJUDICATA.

FRANCHISES. See CORPORATIONS, 1. EMINENT DOMAIN, 1-3. MUNICIPAL CORPORATIONS, 1, 2. TAXATION, 9, 10. TELEPHONES, 1.

FRAUD.

See CHATTEL MORTGAGES, 2, 3. EQUITY, 3-5. FALSE PRETENSES. INSURANCE, 17, 18. LANDLORD AND TENANT, 5. WITNESSES, 5.

1. In an action for deceit, based on fraudulent representation as to the total footing of an inventory of a stock of goods sold to plaintiff by defendant, the evidence, stated in the opinion, examined and *held* to support a negative answer to a question in the special verdict: Did the plaintiff, under all the facts and circumstances of the case, as an ordinarily prudent man, have the right to rely upon such representations to be true? *Kaiser v. Nummerdor*, 234

2. In such case, the only artifice suggested was a change in the first figures of the totals from "6" to "8," and it was in dispute whether defendant made or knew of the change, and also whether it was not such an obvious alteration of a previous figure as to at once attract plaintiff's attention and suggest inspection. *Held*, that it could not be said that there was no evidence which, if believed by the jury, might have warranted a negative answer. *Ibid.*

3. It is ordinarily essential in one seeking relief from fraud, whether by damages or rescission, to see that which is apparent, if knowing it, he could not have been deceived by defendant's misrepresentations, and hence, in an action against one who has wilfully deceived him, the question of plaintiff's diligence is properly a question to be submitted to the jury. *Ibid.*

4. It is not error to instruct the jury that the degree of diligence essential in the presence of actual fraudulent representation, is such as ordinarily careful and prudent persons exercise under like circumstances, where it appears that plaintiff was a man of exceptional shrewdness, alertness and experience in the buying and dealing in stocks of goods. *Ibid.*

5. It is the duty of a purchaser of goods upon the representations of another, if he has full means of knowledge by the exercise of ordinary attention to business, to at least look at what he buys, so as to observe patent defects, if there are any such. *Ibid.*

6. Plaintiff, in an action for deceit, was shown to be a man of at least ordinary intelligence and acuteness, and to have had present the means of discovery of the falsity of the representation relied upon. The court instructed the jury that the plaintiff was required to exercise ordinary care and prudence in the matter at issue. *Held*, that while the use of the expression "ordinary attention" would have been better, in its relation to the facts in the case, the instruction cannot have misled the jury as to the law. *Ibid.*

FRAUDS, STATUTE OF.

See EVIDENCE, 10. REPLEVIN, 1.

1. Plaintiff alleged an oral contract whereby she was to remain and serve decedent and his wife faithfully as a daughter, during their lives, or until she should arrive at the age of twenty-one years, or be married, and in consideration thereof she should be rewarded by maintenance and education during such time, and a provision out of decedent's property, such as he would bestow on an own faithful daughter. When the contract was made decedent's property consisted largely of real estate, and all parties had in view, in a general way, such or similar property. *Held*, that the agreement clearly contemplated that the property which was to be subject of bestowal upon plaintiff would be, in part, realty, and the contract was therefore within the condemnation of sec. 2304, Stats. 1898. *Loper v. Estate of Sheldon*, 26

2. In such case, while the contract cannot be used as the basis for computing the amount plaintiff is entitled to recover *quantum meruit*, it is effective to rebut the legal presumption that her services were gratuitously rendered. *Ibid.*

3. In such case, plaintiff's right to recover being limited to a cause of action upon implied contract, such right matured and was enforceable the instant the services were completed, no demand was necessary to set the statute of limitations in motion and it began to run from that time. *Ibid.*

4. Where property, for the purchase price of which action is brought, has been delivered to the defendant by the plaintiff more than two years before the commencement of the action, and the defendant has received the same and appropriated it to its own use, the defense that the contract of sale was void under the statute of frauds cannot be maintained. *Badger Telephone Co. v. Wolf River Telephone Co.* 169

5. A contract to sell an article, which contemplates that the vendor shall first manufacture or produce it by the use of labor and capital, is not within the statute of frauds (sec. 2308, Stats. 1898). *Gross v. Heckert*, 314

6. An agreement by one person to pay certain debts of another as the consideration for the transfer of property to him by the latter is not in the nature of a special promise to answer for

the debt, miscarriage, or default of another, and need not be in writing. *Fosha v. O'Donnell,* 336

FRAUDULENT CONVEYANCES. See CHATTEL MORTGAGES, 2, 3.

GARNISHMENT.

See INSURANCE, 21.

1. A judgment debtor contracted to erect a building on the premises of the garnishee defendant for $1,005, under a contract whereby the garnishee was to pay the laborers and material men as the work progressed, on the contractor's orders, and any sum, over such payments for labor and material, remaining unpaid was to be paid the contractor on the completion of the building. The garnishment papers were served while the work was in progress, and over two months before the building was completed. *Held,* that the contract for the erection of the house was an entirety, and, when the garnishment was served, there was nothing absolutely due nor a liability payable at a future time. *Mundt v. Shabow,* 303
2. An insurance company, after it had adjusted the loss of P., was notified by F. that P. had assigned the policy to him. Thereafter the insurance company was summoned as garnishee of P., but failed to disclose the assignment or the claims thereunder of F., who was not a party to and did not appear in the garnishment action. *Held,* that a judgment against the insurance company in the garnishment action did not prevent F. from recovering from the insurance company the full proceeds of the policy. *Frels v. Little Black F. M. Ins. Co.* 590
3. In such case, it was the duty of the insurance company to bring the fact of such assignment to the attention of the court by setting it up as a defense. *Ibid.*

GENERAL AGENT. See INSURANCE, 8.

GENERAL CITY CHARTER. See MUNICIPAL CORPORATIONS, 2, 3.

GROSS NEGLIGENCE. See NEGLIGENCE, 12. STREET RAILWAYS.

GUARDIAN AND WARD.

See INFANTS.

Where a guardian had contracted for the care of his incompetent ward, a mere volunteer who assisted in the care of the ward without the authority or knowledge of the guardian cannot recover for such services on the ground that they were necessaries. *Schramek v. Shepeck,* 643

GUARDIANS AD LITEM. See INFANTS.

HABEAS CORPUS.

1. Under sec. 23, art. VII, Const., a court commissioner has jurisdiction upon *habeas corpus* to hear and determine whether a person, held for trial on a criminal offense punishable by imprisonment in the state prison, is imprisoned contrary to law. *Longstaff v. State,* 346
2. The action of a court commissioner in discharging on *habeas corpus* a person held for trial on a criminal charge punish-

able by imprisonment in the state prison may be reviewed upon proper proceeding by the circuit court. *Ibid.*

3. In such case, a motion made in the ordinary way is a proper proceeding. *Ibid.*

4. Where a court commissioner has jurisdiction of the subject matter on *habeas corpus* to test the validity of the imprisonment of one held for trial on a criminal charge, errors the commissioner may have committed in deciding any question of law or fact cannot be reviewed by the circuit court on *certiorari.* *Ibid.*

5. In such case, where the circuit court has improperly reversed the order of the court commissioner for errors of judgment in determining the case upon the merits, the error of the circuit court is properly reviewable on writ of error. *Ibid.*

HEALTH. See CONSTITUTIONAL LAW, 4-7.

HEARSAY EVIDENCE. See WITNESSES, 4.

HIGHWAYS.

Establishment by user.

1. In an action for alleged trespass in cutting down fences on plaintiffs' premises, alleged to be a public highway, the evidence considered and *held* to warrant the jury in finding that the road in question had been used and worked as a public highway for a period of ten years before the commencement of this action, and hence, under sec. 1294, Stats. 1898, that the *locus in quo* was a public highway. *Rhodes v. Halvorson,* 99

Same by statutory proceedings: Jurisdiction.

2. A sufficient petition for a highway having been duly filed, the supervisors fixed May 15th as the time for deciding on the petition, and ordered notices of the hearing given. On that day the board met, decided that the notices had been properly posted and served as required by law, and made an order reciting such facts and ordered the highway laid out. The order was dated "May," and at some time was filed in the town clerk's office, but on what exact date it was signed or filed did not appear. No award of damages was ever made or filed on this order. Thereafter new notices of hearing of the same petition were ordered given for August 7th. On the last date an order laying out the highway together with an award of damages was duly made and filed. On *certiorari* to review such proceedings it was *held* that the supervisors lost jurisdiction by the failure to file the order and award of damages within ten days after May 15. *State ex rel. Hewitt v. Graves,* 607

Discontinuance.

3. It being shown that an order discontinuing a highway was lost or destroyed, its contents can be established by secondary evidence, and being so established it is to have the same effect as though it had never been lost or destroyed. *Schroeder v. Klipp,* 245

4. Under sec. 1298, Stats. 1898, an order discontinuing a highway does not raise a conclusive presumption that all requisite notices of the meeting of the board of supervisors had been given, but the presumption mentioned in the section may be overcome by evidence. *Ibid.*

5. Under sec. 1267, Stats. 1898, when only a portion of a highway is sought to be discontinued, the occupants of lands abutting on the portion of such highway not sought to be discontinued are entitled to have notices served upon them. *Ibid.*

6. It appeared, among other things, that the highway in question, part of which was alleged to have been discontinued, extended east and west between sections 3 and 10; that there was a north and south highway along the west side of said sections intersecting the same, and about eighty rods west of the northeast corner of section 10 a highway ran in a northwesterly direction. The portion discontinued extended west from the highway running northwesterly for about one third of the distance to the intersection with the north and south highway. *Held*, that occupants of the northeast quarter of the northeast quarter of section 9, and the southeast quarter of the southeast quarter of section 4, were abutting occupants at the west end of the highway, part of which was discontinued, and failure to serve them with notice as required by sec. 1267, Stats. 1898, was fatal to the proceedings. *Ibid.*

7. In such case, failure of the supervisors *at the time of* making the order discontinuing such portion of such highway, to assess the damages which such abutting occupants sustained, or to procure their waiver or release or to file such award, waiver or release with the town clerk within ten days after their decision on the application, vitiated the proceedings. *Ibid.*

8. In an action for trespass in removing fences, the defendant justified on the ground that the *locus in quo* was a highway. Before the introduction of any evidence the parties stipulated that "up to the time of the attempted discontinuance the *locus in quo* was a highway." After the trial had proceeded, including a considerable portion of the defense, plaintiff attempted to prove that the defendant, in removing the fence, "went outside of the old highway itself, as it formerly existed" and while he admitted "that there was travel over the place, and that a highway had been laid out there," yet he contended "that the highway as traveled was not the highway laid out." *Held*, that defendant having prepared his testimony and tried his case on the faith of the stipulation, it was not error to rule that such stipulation was binding on the plaintiff. *Ibid.*

9. In such case, the mere fact that the highway as traveled was not the highway as laid out is not ground for claiming that the *locus in quo* is outside the highway. *Ibid.*

Encroachments. See ACTION, 1, 2. RES ADJUDICATA, 2, 3.

Defects: Injuries to travelers. See NEGLIGENCE, 14, 15.

10. It is not consistent with ordinary care for one, with knowledge of the facts, to attempt to travel with horse and carriage over a section of a highway many rods in length, the pathway being on a narrow dirt fill six feet high, covered by water to a depth of about three feet, entirely obstructing it and all objects that would otherwise suggest with some reasonable certainty the location thereof. *Schrunk v. St. Joseph*, 223

11. In an action for damages alleged to have been caused by the insufficiency of a highway, an issue being raised by the pleadings and the truth of the matter controverted on the evidence as to such insufficiency being the result of an extraordinary

event, as a sudden and extraordinary accumulation of water, such issue, upon a special verdict being demanded, should be submitted for determination by a proper question. *Ibid.*

12. The duty of a municipality to keep its highways in a reasonably safe condition for public use does not include providing against insufficiency caused by extraordinary events. *Ibid.*

13. In an action for damages alleged to have been caused by the insufficiency of a highway, the evidence disclosing conclusively that the condition causing the injury was produced by some extraordinary event, as an unusual accumulation of water, a verdict of no cause of action should be directed on a motion being made therefor. *Ibid.*

14. In an action for damages alleged to have been produced by the insufficiency of a highway, where contributory negligence of the plaintiff and of some other person, imputable to him, are in issue, the controversy as to such fault as to each should form the subject of an independent question upon the case being submitted for a special verdict. *Ibid.*

Same: Surface water.

15. In an action against a town for damage, alleged to have been occasioned by surface water diverted from its former course, and conducted through a culvert, insufficient in size and improperly located, the complaint considered, and *held* to state no cause of action. *Merkel v. Germantown,* 494

16. For the purposes of improving highways, a town has the same right to divert and obstruct the natural flow of mere surface water as private individuals. *Ibid.*

HOMICIDE.

See CRIMINAL LAW, 9–11, 13.

1. If a person inflicts upon another a fatal wound, intending thereby to cause that other's death, and such intention is effected, there being no attending circumstances rendering the homicide justifiable or excusable, such person is guilty of murder in the first degree. *Cupps v. State,* 504

2. If a person takes the life of another by an act naturally calculated to produce that result, in the absence of any explanatory circumstance or circumstances rendering the homicide excusable or justifiable, or criminal in some degree less than the highest, or creating a reasonable doubt in regard to one of such contingencies, the law presumes that he intended the result effected and is guilty of murder in the first degree. *Ibid.*

3. Proof that a prson took the life of another by an act naturally calculated to effect that result *prima facie* establishes guilt to the fullest extent charged. *Ibid.*

4. At the point last suggested the burden is cast upon the accused to rebut the *prima facie* case made against him to the extent indicated in No. 2, or the jury will be warranted in finding a verdict of murder in the first degree. *Ibid.*

HUSBAND AND WIFE. See FALSE PRETENSES, 7.

HYPOTHETICAL QUESTIONS. See MUNICIPAL CORPORATIONS, 14.

IMPLIED CONTRACTS. See FRAUDS, STATUTE OF, 3. TRIAL, 21.

IMPROVEMENTS. See EQUITY, 2. MUNICIPAL CORPORATIONS, 9, 10.

INCOMPETENT PERSON. See GUARDIAN AND WARD.

INCONSISTENT DEFENSES. See ADVERSE POSSESSION, 1. LIMITATION OF ACTIONS, 1.

INDICTMENT AND INFORMATION. See FALSE PRETENSES, 2.

INFANTS.

See NEGLIGENCE, 13, 14.

Where a plaintiff is a minor, objection that no guardian *ad litem* was ever appointed is too late when raised for the first time in the supreme court. Such objection raises the question of plaintiff's legal capacity to sue, and must be taken by demurrer or answer, or it is waived. *Fey v. I. O. O. F. Mut. L. Ins. Society,* 358

INJUNCTIONS. See ACTIONS, 1, 2. ARBITRATION, 1. EMINENT DOMAIN, 3. MUNICIPAL CORPORATIONS, 1. RES ADJUDICATA, 3.

INSTRUCTIONS TO JURY. See APPEAL, 6, 15, 24. BUILDING CONTRACTS, 1. CRIMINAL LAW, 4–16. FALSE PRETENSES, 2, 3. FRAUD, 4, 6. INSURANCE, 18. MASTER AND SERVANT. RAPE, 6. TRIAL, 3–12, 19.

INSURANCE.

LIFE.

Benefit associations.

1. Where a benefit certificate, void in case of suicide, contained a provision that no action should be brought or maintained thereon unless commenced within one year from the death of insured, and action was commenced more than one year thereafter, a nonsuit should be entered, or a verdict directed, unless there are facts in evidence tending to show that the contract provision was waived or otherwise obviated. *Fey v. I. O. O. F. Mut. L. Ins. Society,* 358

2. In such case, it appeared, among other things, that insured died August 8, 1900, and proofs of death were duly furnished September 5, no objection thereto being made. November 28, 1900, the beneficiaries' attorney wrote asking when payment might be expected. Receiving no reply, he wrote again February 16, 1901, and was informed on February 19 that the matter was in the hands of claim committee, that he would be notified, and, on April 16, following, the company's secretary wrote the attorney that the claim was in the hands of the company's general counsel, investigation having developed the fact that death was the result of *suicide*, and "so soon as I have heard from him will communicate with you," followed by no further communication from the company. The action was commenced February 10, 1902. *Held*, that even if the letter of February 19, could be construed as a request, express or implied, to delay action, the letter of April 16 must be construed as putting an end to negotiation, and withdrawing any implied request for delay. *Ibid.*

3. In such case, a letter dated November 28, 1900, from defendant to one who testified he was its local agent, considered, and *held* that even though the contents could be construed as a request for delay, yet the letter of April 16, to the attorney

terminated the request, and hence the full contract year had expired before action was brought. *Ibid.*

4. In an action on a benefit certificate, issued by a foreign corporation, providing that action must be begun within one year after the death of the insured, it appeared, among other things, that the death occurred August 8, 1900, and that action was commenced February 10, 1902; that G., a witness called by plaintiffs, testified he was defendant's agent up to February 16, 1902; that he collected and remitted dues and assessments as such agent; that he informed defendant of insured's death, signing himself "local agent," and that in response blanks were sent him and he made out the proofs of death. This evidence was introduced by plaintiffs to prove agency, and to justify subsequent introduction of G.'s declarations, as binding on defendant, which were received in evidence. *Held:*
(1) That after successfully assuming G.'s agency and reaping the advantage of it for one purpose, plaintiffs could not abandon it for another purpose.
(2) That G. was an agent for the service of process within the calls of subd. 9, sec. 2637, Stats. 1898.
(3) That evidence produced by defendant, in effect, that G. was not defendant's agent, and that it never had any agents in Wisconsin, did not excuse plaintiffs' failure to bring the action within the year limited by the certificate. *Ibid.*

5. In an action on a benefit certificate, void in case of suicide, the fact that death was caused by drinking carbolic acid was proven beyond dispute, the real issue being whether the taking was accidental. Defendant offered in evidence the verdict of the coroner's jury that deceased came to his death by "taking carbolic acid." *Held*, even though the verdict was admissible, which may be doubted, that its rejection was not prejudicial error. *Ibid.*

6. In such case, while the exclusion of the proofs of death, containing the statement that deceased "swallowed carbolic acid" is error, it did not prejudice defendant because that fact was not in dispute. *Ibid.*

7. In an action on a benefit certificate where one material issue was whether the death of the insured was caused by suicide, sane or insane, a question of the special verdict "Did (deceased) come to his death as the result of an act voluntarily committed, with intent to produce death by his own hands?" considered, and *held*, not well framed, though not materially defective. *Ibid.*

FIRE. See APPEAL, 23.

Insurance agents and brokers. See INSURANCE, 4.

8. One who, as a broker, obtains for another, from the regular agent of an insurance company, a policy of fire insurance, delivering it to, and collecting the premium from, such other, and paying the latter to such agent, is, as to such transaction, a general agent of such company under sec. 1977, Stats. 1898. *Welch v. Fire Association,* 456

Standard policy.

9. Prior to the standard policy law, knowledge of the agent of an insurance company, at the time of making a contract of insurance for it, of facts affecting the validity thereof, was in re-

gard thereto equivalent to knowledge of such facts by the company. *Welch v. Fire Association,* 456

10. Independently of the standard policy law, knowledge of an insurance company, direct or indirect, at the time of issuing a policy of insurance, of facts respecting the subject thereof affecting the validity of the contract, precludes it, on principles of estoppel *in pais*, from taking advantage of such facts, in case of a loss, to escape liability. *Ibid.*

11. The disability provisions of the standard policy law as to waiver do not abrogate the judicial rule protecting a policy holder, upon principles of estoppel *in pais*, as to circumstances affecting the validity of the contract known to the insurance company at the inception thereof. *Ibid.*

12. The clause of the standard policy law expressly continuing in force the rule charging an insurance company with the knowledge possessed by its agent at the time of the delivery by him of a policy, was incorporated into such law to prevent impairment of the legal effect of such knowledge as established by the decisions of this court. *Ibid.*

13. The effect of the rule so established and preserved is that an insurance company, assuming one attitude as to known facts for the purpose of making an insurance contract, is not permitted to successfully assume a different and inconsistent attitude to avoid it. *Ibid.*

14. There being no provision in the standard policy, in connection with that requiring proofs within sixty days after the occurrence of a loss, rendering failure to comply therewith a cause of forfeiture, such failure merely postpones the maturity of the claim till sixty days after such proofs are furnished. *Ibid.*

15. The principle last above stated was an element in the judicial policy of this state when the standard policy law was enacted, and was preserved therein by this language, "The loss shall be payable sixty days after the notice of proof of loss required has been received by the company," and by the omission therefrom of any provision making failure to furnish proofs within sixty days after a fire a cause of forfeiture. *Ibid.*

16. The provision of the policy last spoken of, that charging an insurance company with knowledge possessed by its agent at the time of the delivery of a policy, vital to the validity thereof, and that charging the company with knowledge possessed by its agent engaged in adjusting a loss thereunder, were incorporated in the standard policy in order to prevent impairment of existing rules on the subject, according to the judicial policy of the state. *Ibid.*

Avoidance of policy for fraud.

17. Defendants alleged that the policies in suit had been avided by fraudulent overstatement of the loss, and that the insured did not in fact have on hand, at the time of the fire, the large stock of goods, consisting of articles readily convertible into money, which she claimed to have then had and to have held and stored for some years. *Held*, that upon this issue of fraud defendants might show that the insured, at and prior to the time of the fire, was in straitened financial circumstances. *Rickeman v. Williamsburg City F. Ins. Co.* 655

18. Instructions assuming that the insured had removed the debris of a fire with the intent and for the purpose of destroying evidence are *held* to have been properly refused, it being a question for the jury, upon the evidence, whether the removal was prompted by such motives or not. *Ibid.*

Assignment after adjusted loss. See GARNISHMENT, 2, 3.

19. After an adjustment of a fire loss, the assured assigned and transferred his interest in the policy. *Held*, that right of the assignee to the proceeds of the adjusted loss was absolute as against his assignor. *Frels v. Little Black F. M. Ins. Co.* 590

20. In such case, the fact that no fund is shown to have been in the hands of the insurance company as due on the policy, or then enforceable by action, cannot stand in the way of an equitable transfer of the proceeds of the policy, if the claim is thereafter definitely established under the facts and circumstances as they existed when the assignment was made. *Ibid.*

Limitation of action.

21. A policy of insurance contained this provision: "Any suit or action for the recovery of any claim by virtue of this policy, shall not be sustained in any court unless such suit or action be commenced within twelve months after the loss occurred." A loss under the policy having occurred, it was adjusted, and shortly thereafter plaintiff gave notice that he claimed the proceeds as assignee of the insured. The company never asserted any defense against their liability, but their correspondence showed that they stood ready to pay the loss but for garnishment proceedings pending. In an action by such assignee, to recover the amount of such adjusted loss, brought more than one year after the loss, it was *held* that the insurance company was estopped from asserting any defense under the contract limitation above quoted. *Frels v. Little Black F. M. Ins. Co.* 590

INSURANCE AGENTS. See INSURANCE, 4, 8.

INTENT. See CONTRACTS, 8. CRIMINAL LAW, 1, 2. DAMAGES, 1, 9. HOMICIDE. INSURANCE, 18.

INTERURBAN RAILWAYS. See EMINENT DOMAIN, 1–3. STREET RAILWAYS.

ISLANDS. See WATERS.

JOINDER.

Of causes of action. See ACTION, 6, 7.

Of parties. See SCHOOLS AND SCHOOL DISTRICTS, 2.

JUDGMENTS.

Nature and essentials. See APPEAL, 4.

On trial of issues. See TAXATION, 8.

Amendment. See MORTGAGES, 2.

Construction.

In an action on a tax deed to bar former owners, judgment was by default that defendant McC. (who was personally served in Idaho, pursuant to order for service outside the state), and O. (who was personally served in Wisconsin), be forever barred from all right in the described lands, "and that plaintiff have his costs and disbursements in this action, taxed at," etc. *Held*,

that reference to the record disclosed affirmatively that the judgment for costs could not be construed as personally enforceable against McC., and hence was not prejudicial as to him. *Maxcy v. McCord,* 571

Conclusiveness of adjudication. See JURISDICTION.

Satisfaction and discharge. See ARBITRATION.

JURISDICTION.

See ACTION, 5. APPEAL, 2, 3. COMPROMISE AND SETTLEMENT, 3. COURTS. HABEAS CORPUS, 1, 4. HIGHWAYS, 2–9. JUDGMENTS. JUSTICES' COURTS, 1–3, 6. SUPREME COURT. VENDOR AND PURCHASER, 3, 4.

In an action against a non-resident, the court has no jurisdiction of the person to enable it to render a money judgment for costs, where such defendant is served with process only outside its territorial jurisdiction. *Maxcy v. McCord,* 571

JUSTICES' COURTS.

See RES ADJUDICATA, 3. TAXATION, 8–10.

1. It is the duty of the party appealing from a judgment rendered by a justice of the peace to see that a return to the appellate court is made; until this is done the appeal is imperfect and the appellate court has power only to compel a return or dismiss the appeal. *Allard v. Smith,* 22
2. Defendant appealed from a judgment rendered by a justice of the peace, but before return was made the term of office of the justice before whom the judgment was rendered expired. His successor in office filed in the appellate court a certified copy of the docket entries in the case, but returned no papers, the same having been lost. *Held,* under the provisions of secs. 3764, 3765, Stats. 1898, that the copy of the docket filed constituted no return. *Ibid.*
3. In such case, the appeal could not be dismissed under the provisions of sec. 3766, Stats. 1898, because no return had been made, but under the facts stated in the opinion, and under the inherent power possessed by the circuit court to require the diligent prosecution of actions, no error was committed in dismissing the appeal. *Ibid.*
4. Where, on an appeal from a judgment rendered by a justice of the peace, a motion to dismiss the *action* was orally granted, the circuit court has the power, at the same term and before the order of dismissal had been reduced to writing, to amend the motion and order so that they should provide for a dismissal of the *appeal.* *Ibid.*
5. Where an appeal from a justice's court gives the parties the right to a trial *de novo,* and the justice has ordered security for costs which was not given and the action dismissed for that reason, an application to the circuit court to require security for costs is addressed to the discretion of that court, and is not subject to review except where there has been an abuse thereof. *Simanek v. Nemetz,* 42
6. On appeal from a circuit court judgment in an action appealed from justice court and tried *de novo,* whether the circuit court

was without jurisdiction of the subject-matter because the justice did not obtain it is to be solved from the record, which does not include the justice's docket or the minutes of his proceedings unless the same are made a part thereof by a bill of exceptions. *Washburn v. Washburn W. W. Co.* 575

JURY. See APPEAL, 14, 15. NEW TRIAL, 1, 2. TRIAL, 3–20.

KNOWLEDGE OF AGENT. See INSURANCE, 9–13, 16.

LANDLORD AND TENANT.

See EVIDENCE, 9. MUNICIPAL CORPORATIONS, 2. PARTIES.

Enjoyment and use.

1. Plaintiff conveyed by warranty deed certain lands, part of which had theretofore been leased by parol for six months. The tenant entered into possession and during the term of his lease planted and cultivated therein vegetables. After the delivery of the deed, and before the expiration of this term, the tenant assigned to plaintiff his lease and interest in the growing vegetables. The grantee in the deed thereafter entered upon the demised premises and converted to his own use the vegetables so raised thereon. Plaintiff thereupon brought replevin for such vegetables. *Held*, that the warranty deed was not conclusive as against plaintiff's right to the vegetables growing upon the land at the time the deed was given. *Simanek v. Nemetz*, 42
2. In such case, parol evidence as to the purchase and sale of the real estate, and the conditions thereof, and the vegetables growing thereon, is admissible. *Ibid.*
3. In such case, the tenant had an absolute right to the vegetables not only as against plaintiff, but as against the grantee, and had the right to sell and transfer the same to plaintiff. *Ibid.*
4. In such case, *held*, that the crop of vegetables was personal property, and that plaintiff was not estopped by the covenants of his deed from acquiring the title and possession of the vegetables, and holding the same as against his grantee. *Ibid.*

Breach of lease: Damages.

5. Where a lease is made covering in whole or in part an outstanding term, the circumstances being such that the lessor knows or ought to know that his lessee will not be able to enjoy such term according to the agreement, the lessor is deemed guilty of a wrong of a fraudulent character, rendering him liable not merely for the rent which has been paid in advance, with interest, but also for special damages under the rule therefor applicable to ordinary contracts. *Gross v. Heckert*, 314
6. In an action to recover damages for breach of a lease of a store building, it appeared that at the time the lease was made the lessor knew that the lessee intended to use the premises for saloon purposes and proposed to prepare therefor prior to the commencement of the term. *Held*, that the plaintiff might recover the difference between the cost of saloon fixtures, appliances, and liquors which he had ordered for use in the demised building and their market value in cash at the time of the breach, with interest from such time. *Ibid.*

7. In such case, the value at the time of the breach may be established by evidence of a sale made within a reasonable time after the breach and in a manner reasonably calculated to produce the fair market value; but in the absence of such a sale the value may be established by other competent evidence. *Ibid.*

8. In such case, evidence that the lessee paid a certain sum for a release from liability on a contract for the purchase of a stock of liquors, which were never delivered, does not establish that the market value of the liquors at the time of the breach was the difference between the contract price and the amount so paid for such release. *Ibid.*

9. In such case, an advance payment made by the lessee to a person engaged by him to aid in conducting the saloon business is not a proper element of damages in an action for breach of the lease. *Ibid.*

10. In such case, a sale of the property purchased by the lessee eight months after the breach of the lease is *held* too remote to be reasonable, in the absence of some explanation, and some evidence that the property at that late date would probably have brought substantially the price which might have been obtained at or about the time of the breach. *Ibid.*

11. In such case, no allowance for storage or care of the property purchased by the lessee should be made him in assessing his damages for breach of the lease except as a part of the legitimate expenses of a sale made to create evidence of value. *Ibid.*

12. In such case, the lessee would be entitled to recover as an element of damages any excess in the value of the term over the agreed rent, but evidence that the premises were exceptionally valuable for saloon purposes, and that the prior tenant had made a profit of $2,000 per year in that business, is *held* too uncertain to warant an award on that ground. *Ibid.*

LAW OF CASE. See APPEAL, 29.

LEGISLATURE. See CONSTITUTIONAL LAW, 1–4. EXECUTORS AND ADMINISTRATORS, 1.

LETTERS. See DAMAGES, 9. EVIDENCE, 3, 4. INSURANCE, 2–4.

LEVY. See TAXATION.

LIENS. See CORPORATIONS, 2–4. VENDOR AND PURCHASER, 1, 3, 4.

LIFE INSURANCE. See INSURANCE, 1–8.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. APPEAL, 4, 5. DEEDS, 3. FRAUDS, STATUTE OF, 3. INSURANCE, 1–4, 21. TAXATION, 5. TAX TITLES, 3.

1. Claims of title under the ten-year and twenty-year statute of limitations are not inconsistent. They may be pleaded as separate defenses in the same answer under the code. *Roberts v. Decker*, 102

2. Sec. 4234, Stats. 1898, extending for one year the limitation on commencement of an action, where the person entitled to bring the action dies before the term limited expires, applies to legal limitations, and does not affect limitations on bringing action provided by contract. *Fey v. I. O. O. F. Mut. L. Ins. Society.* 358

LOCAL ACTIONS. See ACTION, 4, 5.

LOCAL LAWS. See CONSTITUTIONAL LAW, 1.

MANDATE. See APPEAL, 30.

MARKET PRICE. See DAMAGES, 3, 13. LANDLORD AND TENANT, 7, 8.

MASTER AND SERVANT.

See NEGLIGENCE, 8. RAILROADS, 6–9.

1. In an action for personal injuries against a father and his son, for negligence of the son, alleged to be the servant of the father, the court in denying a motion for a non-suit, and in the presence of the jury, made remarks from which the jury and bystanders would naturally infer that, in the opinion of the court, the testimony of defendants was unworthy of credit, and that no one in the court room would believe them. The court at the time, and later in the instructions to the jury, cautioned the jury not to be influenced by such remarks, as they were intended merely for counsel, and not for the jury. *Held*, that while such remarks were objectionable, they would not work a reversal for want of exception thereto. *Davis v. Dregne*, 63
2. In such case, the court in its instruction to the jury on the question as to whether plaintiff had used ordinary care, used language from which the jury might infer that, in the opinion of the court, the plaintiff had done everything that the law required him to do, and that his statement as to what he did was a verity in the case, and must be accepted as true by the jury. *Held*, when considered in connection with the court's remarks on the motion for a nonsuit, that the court invaded the province of the jury, and thereby defendants were prejudiced. *Ibid.*

MAXIMS.
Caveat emptor, 237, 240, 242.
Falsus in uno, falsus in omnibus, 622, 626.
Res inter alios acta, 149.
Res ipsa loquitur, 257.

MEASURE OF DAMAGES. See BUILDING CONTRACTS, 2. DAMAGES, 2–14. SHERIFFS, 5.

MEETINGS. See COUNTY BOARD.

MEMORANDA. See APPEAL, 15. EVIDENCE, 5–7.

MINORS. See INFANTS. NEGLIGENCE, 13, 14.

MISCONDUCT OF JURORS. See NEW TRIAL, 1, 2.

MISJOINDER of causes of action. See ACTIONS, 6.

MISTAKE. See COSTS, 2. SHERIFFS, 1. WATERS, 2.

MITIGATION OF DAMAGES. See BUILDING CONTRACTS, 2, 3.

MORTGAGES.

See CHATTEL MORTGAGES. CORPORATIONS, 4. EQUITY, 4. EVIDENCE, 9. WITNESSES, 5.

1. In an action to set aside a foreclosure sale, it appeared that the judgment on default was signed by the trial court, and the costs taxed and inserted therein January 14, 1896; that the judgment roll with the costs so taxed inserted, was, on that

day, handed to the clerk, who retained them in his office until October 25, 1897, at which date the clerk indorsed such judgment as filed, and entered the same of record. *Held*, that the mere improper failure of the clerk to mark the papers as filed on January 14, did not prevent the actual filing at that date from being effectual. *Hart v. Jos. Schlitz B. Co.* 553

2. In an action to set aside a foreclosure sale it appeared, among other things, that the judgment on default was entered January 14, 1896; that on October 13, 1897, on the plaintiff's application, an order was entered reducing the amount of solicitors fees from $100 to $50, so as to conform to the findings as originally drawn; that the sale thereunder was had April 8, 1898, and that the mortgagors took no steps to set aside the sale until December 5, 1900. *Held*, that such alteration of the judgment did not make a new judgment, nor extend the time for redeeming from the judgment which had originally been entered. *Ibid.*

MOTION COSTS. See COSTS, 3.

MOTION. See CRIMINAL LAW, 1, 2. DAMAGES, 1, 9. INSURANCE, 18.

MUNICIPAL CORPORATIONS.

General city charter: Adoption. See MUNICIPAL CORPORATIONS, 2.

Electric light poles: Board of public works.

1. Under sec. 925—88, Stats. 1898, the time and manner of using the streets of cities, for the purpose of placing electric light poles therein, is to be determined by the board of public works, subject to review by the common council. The defendant, operating under an ordinance or franchise passed by the common council, attempted to place an electric light pole in front of plaintiff's premises, without his permission, and in advance of any action by the public authorities except an order allowing the defendant to set *a pole* and string its wires on the side of the street on which plaintiff lived. *Held*, that until the city authorities had exercised the power given them, and authorized a pole to be put at the point where defendant, against plaintiff's objection, did put it, plaintiff is entitled to an injunction restraining such action. *Malone v. Waukesha E. L. Co.* 485

Waterworks: Franchise: Construction.

2. A franchise was granted by a municipality to construct and operate a waterworks within its boundaries, to furnish water for public and private use for a period of twenty-five years from its date, and to use the public places to that end, the municipality leasing of the grantee fire hydrants for said term and agreeing to pay a rental of $4,000 per year and the municipal taxes assessed on the property for the first ten years, and to pay $4,000 per year thereafter during such term, payable in two instalments of $2,000 each on the 1st days of January and July, earning capacity to commence when, upon the works being tested, they were found to comply with the franchise and contract. *Held:*

(a) The leasehold period and the franchise period are coextensive, both commencing with the date of the franchise and ending twenty-five years thereafter.

(b) The words "during such term" refer to the period of twenty-five years, rent, however, to commence when water service commences.

(c) The words "first ten years" point to the first period of ten years in a period of twenty-five years; and there being no period of twenty-five years except the one commencing with the life of the franchise, the ten-year period commenced at the same time.

(d) The words "tax assessed" refer to all the proceedings requisite to charge the property or the owner thereof with the payment of taxes, culminating not earlier than when the taxes might be paid.

(e) The words "for the first ten years" were used in the sense of during the ten years subsequent to the date of the franchise.

(f) The agreement being to pay the taxes assessed during a period of ten years subsequent to the date of the franchise, it is immaterial whether taxes were assessed during the first of such years, as regards what were the last taxes to be paid. *Washburn v. Washburn W. W. Co.* 575

Special assessments: Sprinkling streets. See EQUITY, 2.

3. The city of Antigo had no power under its special charter to sprinkle streets at the cost of lots fronting thereon. Before it attempted to take proceedings resulting in a special assessment against plaintiffs' lot, it adopted from the general city charter, subd. 40, sec. 925—52, Stats. 1898, but did not adopt secs. 925—175 to 925—197*a*, Stats. 1898, or any part thereof. *Held*, that thereby the city failed to adopt the whole legislative scheme providing for sprinkling of streets and charging the cost thereof to the property benefited, and that such failure was fatal, rendering the attempted adoption of subd. 40, sec. 925—52, invalid, and the special assessment on plaintiff's lot void. *Borgman v. Antigo,* 296

4. In such case, the special assessment against plaintiff's lots cannot be upheld under ch. 40*b*, Stats. 1898, particularly sec. 926—10 thereof, where the findings of the trial court, supported by proof, disclose that the petition by which the proceedings were initiated was not signed by the owners of a majority of the frontage upon the street which was to be sprinkled, and that the city wholly omitted to contract with the persons who did the sprinkling. *Ibid.*

Contracts: Committee of common council.

5. The duties of a committee of a common council appointed not only to buy a horse, but to pass upon the suitableness of the animal for the purpose for which it is intended, are more than merely ministerial in character. *Kavanaugh v. Wausau,* 611

6. In such case, the action of two members of a committee of three, in contracting for the horse without notice to their associate, or opportunity for him to participate in the matter, is invalid, and, in an action against the city for the purchase price for the horse, there being no evidence of subsequent ratification, a motion for a directed verdict should be granted. *Ibid.*

7. Where the testimony was all one way, that two members of a committee of three met without previous notice or concurrence in the matter, and transacted the business of a committee without the other member knowing that any such transaction

was in contemplation, a presumption of notice to the non-participating member of the committee, or consent by him to the act of his associates, is completely rebutted. *Ibid.*

8. In an action for the purchase price of a horse, alleged to have been purchased from plaintiff by two members of a committee of three appointed by a common council, without previous notice to or concurrence by the non-participating member; the disallowance of the claim by the council upon the report of the comptroller that the horse was not as represented, is not a ratification of the purchase, unless the council, when such action was taken, knew the facts rendering the purchase invalid. *Ibid.*

Improvements: Sidewalks: Parties. See EMINENT DOMAIN.

9. Sec. 925—175, Stats. 1898, of the general charter law, gives cities the power to improve streets, and subch. XIX (secs. 925—201 to 925—207, Stats. 1898), provides how, in the construction and maintenance of sidewalks, these powers shall be exercised, and that the expense of every original construction and relaying of sidewalks is chargeable upon the lots abutting upon the improved part of the streets. *Held:*

(1) That such liability on the part of the lot owner makes him an interested party to the proceedings resulting in such improvements, and vests him with the right to insist that the course of action prescribed be followed by the representatives of the city in executing and carrying out such improvements.

(2) That the city is limited to the course therein prescribed, in constructing, maintaining, and improving sidewalks, and is liable for injuries resulting from illegal proceedings. *Waukesha v. Randles,* 470

10. Under sec. 925—204, Stats. 1898, as amended by ch. 173, Laws of 1899, and the facts stated in the opinion, *held:*

(1) That the building of a certain sidewalk was an improvement permanent in its nature and not a repair for temporary use until the contemplated permanent improvement be executed.

(2) That defendants could not be required to do the work prescribed by the order in question, under the statutory provisions authorizing the rebuilding of an insufficient and defective walk.

(3) That defendants had the right to insist that the grading for the sidewalk should be considered part of the permanent improvement of the street, and let by contract with the other work on such street, and that the expense thereof be borne in all respects like that of improving the streets.

(4) That defendants were entitled to have ten days after such grading was completed in which to lay the sidewalk at their own expense

(5) That the action of the city officials in undertaking to grade for and lay such sidewalk was illegal. *Ibid.*

Same: Paving. See EQUITY, 2.

Streets and sidewalks: Injuries from defects: Notice. See DAMAGES, 15. HIGHWAYS, 10–14. NEGLIGENCE, 14, 15. TRIAL, 15.

11. In an action for personal injuries by reason of an alleged defect in a sidewalk of defendant city, the notice thereof to the city considered, and *held* to comply with the requirements of sec. 1339, Stats. 1898, and to describe the place of injury and

insufficiency complained of with sufficient particularity to inform the city of the place of the accident. *Ruscher v. Stanley.* 380

12. In such case, *held*, that the facts left no room for a claim that defendant was misled as to the place of injury, and thereby prevented from making the necessary inspection. *Ibid.*

Same: Evidence.

13. In an action for personal injuries alleged to have been occasioned by the insufficiency of a sidewalk, testimony of a witness, to whom plaintiff pointed out the place of the accident, that he saw loose planks in the walk, is competent and material as tending to show the nature of the insufficiency at the place of the accident. *Ruscher v. Stanley,* 380

14. In an action for personal injuries, the evidentiary facts before the court examined, and *held* that several hypothetical questions propounded to a witness as an expert were properly excluded. *Ibid.*

MURDER. See CRIMINAL LAW, 9–11, 13. HOMICIDE.

MUTUALITY. See CONTRACTS, 2.

NAVIGABLE WATERS. See BOUNDARIES. WATERS.

NEGLIGENCE.

See ACTION, 4, 5. APPEAL, 29. DAMAGES, 15. HIGHWAYS, 10–14. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 11–14. NEW TRIAL, 4. RAILROADS. STREET RAILWAYS. TRIAL, 15.

1. Defendant purchased a 22-caliber Stevens rifle for the use of his seventeen-year-old son Nicholas, who was accustomed to hunt, and was frequently accompanied by a seven-year-old brother, Jesse, who, on such occasions, usually carried the gun. Defendant knew of these facts but had given positive instructions that Jesse should never be allowed to have the rifle in his hands while loaded, and had no knowledge that such instructions were ever disobeyed. In an action to recover for the negligent killing of plaintiff's intestate, while the rifle was in the possession of Jesse, *held* that it was not error to refuse to direct the jury to find defendant negligent, or refuse to set aside a verdict finding the contrary. *Taylor v. Seil,* 32

2. A 22-caliber Stevens rifle is not a pistol or revolver, within the calls of sec. 4397, Stats. 1898, prohibiting any dealer or other person from selling, loaning or giving any pistol or revolver to any minor. *Ibid.*

3. A 22-caliber Stevens rifle, used for hunting and killing game, is not a toy pistol, toy revolver or toy firearm, within sec. 4397*a*, Stats. 1898, denouncing a punishment on the use or possession of such. *Ibid.*

4. In an action to recover for injury to plaintiff's horses claimed to have been caused by feeding them copperas, sold and delivered to him by defendants by mistake for Glauber's salt, evidence was *held* sufficient to show that copperas fed to horses in such quantities as plaintiff gave was injurious to health. *Kennedy v. Plank,* 197

5. Evidence that plaintiff procured copperas for a neighbor under the same circumstances as he procured it for himself; that

such neighbor fed it to his horses; that his horses manifested the same symptoms as those of plaintiff's within the same time, and that a *post mortem* examination disclosed physical conditions similar to those found in plaintiff's horses and indicated the cause of death and ailment of the animal, is *held* to have been admissible as tending to corroborate that the sickness of plaintiff's horses was the result of defendants' negligence. *Ibid.*

6. In such case, refusal to grant a new trial on the ground of newly discovered evidence, based upon affidavits tending to show that after the death of plaintiff's horses he and the veterinary surgeon who treated them made statements as to the cause of their death at variance with their testimony on the trial, is *held* not to have been erroneous. *Ibid.*

7. A person of ordinary care may not always exercise it; hence, whether such a person would or might on a particular occasion conduct himself in a particular way, gives no legal criterion by which to determine whether such conduct would be consistent with such care. The true test is, Would a person of ordinary care under the same or similar circumstances ordinarily so conduct himself? *Schrunk v. St. Joseph,* 223

8. In an action for injuries sustained by the falling over of a door, taken from its hinges by defendants' servants and placed on a platform against the building, evidence of plaintiff, in effect, that she was standing on the platform, that she did not touch the door, and that from some unexplained cause it fell upon and injured her, raises a presumption that the door was negligently placed in such a position that it was liable to fall over without assistance. *Klitzke v. Webb,* 254

9. Such proof is sufficient, when plaintiff rests, to take the question of defendants' negligence to the jury. *Ibid.*

10. In such case, such presumption is overcome by direct and positive proof that when the door was removed from its hinges and placed on the platform its base was placed against a row of nail heads in the platform eighteen inches distant from and parallel with the building, and that it leaned against the building with its top just under a gas pipe which ran along on the outside of the building. *Ibid.*

11. In an action for personal injury alleged to have been caused by defendant's negligence, the evidence, stated in the opinion, considered, and *held* to present a situation from which a reasonable inference could be drawn in support of either party to the action on the question of defendant's negligence and of plaintiff's contributory negligence, and it was therefore error to direct a verdict. *Morgan v. Pleshek,* 306

Wanton and wilful injuries.

12. In an action for personal injuries charged to have been committed in such a wanton and wilful manner as to amount to an intention to inflict the injuries, there can be no recovery on testimony showing a want of ordinary care, even though gross negligence or intentional wrong is not proven. *Wilson v. Chippewa Valley E. R. Co.* 636

"Attractive nuisances."

13. In an action for personal injuries to a five-year-old child received while playing on a pile of timbers, the complaint con-

sidered, and *held* that the gist of the complaint was the instability of the timbers, which may have existed even though the reason for the instability alleged in the complaint was not proven, and hence evidence of other defective and instable conditions than those alleged was admissible. *Busse v. Rogers*, 443

14. In an action for personal injuries it appeared, among other things, that plaintiff, a five-year-old child, was playing in a pile of timbers left by defendants opposite their own premises within the limits of a city street; that the timbers, through defendants' negligence were insecurely placed on the pile, and that plaintiff was injured by a timber falling on her. It also appeared that the traveled portion of the street was ample and properly prepared for travel; that the strip occupied by defendants, though within the limits of the street as dedicated, was used with the consent of the public authorities, and that plaintiff was not using or attempting to use the place for travel, but for play. *Held:*
(1) That the timbers were wrongfully in the street, and constituted a nuisance in fact and in law.
(2) That the act of leaving the pile of timbers in the street, in the condition disclosed by the evidence, was actionable negligence.
(3) That the result which followed was one which might have been anticipated by an ordinarily prudent man under the circumstances.
(4) That the fact that the plaintiff turned aside from traveling to play for a brief time in the highway did not necessarily prevent recovery. *Ibid.*

15. In such case, the court intimates no opinion as to what would have been the result had it appeared that the pile of timbers was not upon the street, but upon the defendants' premises. *Ibid.*

Contributory negligence. See HIGHWAYS, 14. NEGLIGENCE, 11. RAILROADS, 9.

16. In an action for personal injuries where the record, supported by the judgment of the trial court, shows that the plaintiff was free from any want of care contributing to produce the accident, defendant cannot complain of a refusal to submit the question of plaintiff's contributory negligence to the jury. *Ruscher v. Stanley*, 380

NEGOTIABLE INSTRUMENTS. See CONTRACTS, 6.

NEW TRIAL.

Grounds: Misconduct of jury.

1. Where the verdict of the jury is sought to be impeached for misconduct of some member thereof in respect to his answers upon the *voir dire*, or in respect to his conduct during the trial, or for undue outside influence upon the jury during the trial, the facts in that regard, to be effective, should be established by clear and satisfactory evidence. *Cupps v. State*, 504

2. The determination of the trial judge respecting the facts in regard to any matter referred to in the last foregoing paragraph is as conclusive as his determination upon any other matter of

fact, in that it must be regarded on an appeal as a verity unless shown to be contrary to the clear preponderance of the evidence. *Ibid.*

Same: Discretion. See APPEAL, 13.

Same: Rulings and instructions at trial. See APPEAL, 30.

Same: Verdict contrary to evidence: Newly-discovered evidence. See APPEAL, 18. NEGLIGENCE, 1, 6.

3. Where it cannot be said that the evidence and all reasonable probabilities are against a verdict, the ruling of the trial court refusing to grant a new trial because the verdict is contrary to the evidence must be sustained. *Schmitt v. Northern Pacific R. Co.* 397

4. A motion for a new trial on the ground of newly-discovered evidence is properly denied, where such evidence is in the possession of the party making the motion, and it was clearly his negligence that it was not present at the time of the trial. *Ibid.*

Costs. See COSTS, 3.

NEXT OF KIN. See EXECUTORS AND ADMINISTRATORS, 2, 3.

NOMINATION. See ELECTIONS, 1, 3.

NONSUIT. See HIGHWAYS, 13. INSURANCE, 1. MASTER AND SERVANT.

NOTICE. See ADVERSE POSSESSION, 3, 4. HIGHWAYS, 5, 6. MUNICIPAL CORPORATIONS, 6–8, 11, 12.

NOTICE TO PRODUCE DOCUMENTS. See EVIDENCE, 4.

NUISANCES. See CONSTITUTIONAL LAW, 4–7. NEGLIGENCE, 14, 15.

OCCUPANTS. See HIGHWAYS, 5–7.

OFFICERS. See ACTION, 1. CONSTITUTIONAL LAW, 4–7. MORTGAGES, 1. SCHOOLS AND SCHOOL DISTRICTS, 2, 3. SHERIFFS.

OPINION EVIDENCE. See MUNICIPAL CORPORATIONS, 14.

ORDINANCES. See EMINENT DOMAIN, 1. MUNICIPAL CORPORATIONS, 1, 2. TOWNS.

PARENT AND CHILD. See MASTER AND SERVANT, 1. NEGLIGENCE, 1.

PAROL AGREEMENTS. See FRAUDS, STATUTE OF, 1, 6.

PAROL EVIDENCE. See EVIDENCE, 8–10. LANDLORD AND TENANT, 2.

PARTIES.

See ACTION, 7. FACTORS, 3–6. MUNICIPAL CORPORATIONS, 9. SCHOOLS AND SCHOOL DISTRICTS, 2.

In an action to recover damages for breach of a lease, it appeared that the lessee had assigned the lease, in form absolutely, to secure an obligation which never ripened into an indebtedness due or to become due, and which had been wholly extinguished before the commencement of the action. *Held*, that the lessee was the real party in interest and could maintain the action in his own name. *Gross v. Heckert,* 314

PARTNERSHIP. See ACTION, 6.

PASSENGERS. See RAILROADS, 1, 2.

PAYMENT.

See ACCORD AND SATISFACTION, 4.

1. The rule that, where payment is to be made by the delivery of specific articles, there is no obligation to pay in money until there is a demand and refusal to deliver the articles, has no application to a contract requiring a defendant to pay to plaintiff $20 in cash *annually*. *Gall v. Gall*, 270
2. A complaint alleging an agreement in writing to pay to the plaintiff $20 every year, the breach of it, and the amount due and unpaid by virtue of the agreement and breach, is sufficient to satisfy the statutory rules of pleading without amendment. *Ibid.*

PENALTY. See ACTION, 1, 2. RES ADJUDICATA, 2.

PERSONAL INJURIES. See ACTION, 4, 5. APPEAL, 29. DAMAGES, 15. HIGHWAYS, 10–14. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 11–14. NEGLIGENCE. RAILROADS. STREET RAILWAYS. TRIAL, 15.

PERSONAL PROPETRY. See LANDLORD AND TENANT, 1–4. TAXATION, 7–10.

PLACE of performance. See CONTRACTS, 6–8.

PLAY. See NEGLIGENCE, 14.

PLEADING. See ACTION, 1, 2, 6. ADVERSE POSSESSION, 1, 2. APPEAL, 21, 22. COMPROMISE AND SETTLEMENT, 1. EQUITY, 1. EVIDENCE, 1. FALSE PRETENSES, 2. HIGHWAYS, 15. LIMITATION OF ACTIONS, 1. NEGLIGENCE, 13. PAYMENT, 2. QUIETING TITLE, 2–5. RELEASE. RES ADJUDICATA, 3. TRIAL, 1.

POLES. See EMINENT DOMAIN, 4. MUNICIPAL CORPORATIONS, 1.

POLICE POWER. See CONSTITUTIONAL LAW, 4–7.

POSSESSION. See ADVERSE POSSESSION. CORPORATIONS, 4. DEEDS, 3. TAX TITLES, 3.

PRACTICE. See APPEAL. CONTINUANCE. COSTS. CRIMINAL LAW. EQUITY, 1. EVIDENCE. EXECUTORS AND ADMINISTRATORS, 3, 4. GARNISHMENT. HABEAS CORPUS. INFANTS. JUSTICES' COURTS. REPLEVIN. TRIAL. WITNESSES, 1–3.

PRAYER FOR RELIEF. See APPEAL, 22. EQUITY, 1.

PRESUMPTIONS. See APPEAL, 8, 9. CONTRACTS, 7. FRAUDS, STATUTE OF. HIGHWAYS, 4. HOMICIDE, 2. MUNICIPAL CORPORATIONS, 7. NEGLIGENCE, 10. WATERS, 1.

PRINCIPAL AND AGENT. See CONTRACTS, 2. DAMAGES, 10–13. FACTORS. INSURANCE, 4, 8.

PRIOR CRIMINALITY. See CRIMINAL LAW, 6.

PRIORITY. See CHATTEL MORTGAGES, 2, 3.

PROFITS. See DAMAGES, 9.

PROMISE. See FRAUDS, STATUTE OF, 6.

PROMISSORY NOTES. See CONTRACTS, 6.

PROOFS OF LOSS. See INSURANCE, 1–3, 14–16.

PUBLIC ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS, 3, 4.

PUBLIC POLICY. See CORPORATIONS, 1.

PUBLIC SERVICE CORPORATIONS. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 1, 2. RAILROADS. STREET RAILWAYS. TAXATION. TELEPHONES.

PUNISHMENTS. See RAPE, 3.

PURCHASERS. See CHATTEL MORTGAGES, 1.

QUANTUM MERUIT. See APPEAL, 21. ELECTION OF REMEDIES. FRAUDS, STATUTE OF, 2.

QUIETING TITLE.

See TAX TITLES, 3.

1. Upon sufficient evidence showing that the plaintiff was unable to read or write the English language; that the land in question was bought with plaintiff's money exclusively; that, though the title was in her husband's name for a considerable time, plaintiff did not know of or consent to such holding; and that as soon as she learned of the fact the title was transferred to her, a judgment removing an apparent cloud upon her title, caused by a judgment obtained against her husband when the record title was in his name, and setting aside a sheriff's certificate of sale upon such judgment, is plainly right. *Kurz v. Kurz,* 222

2. Under the provisions of sec. 3186, Stats. 1898, a complaint alleging, in substance, that plaintiff is the owner in fee simple of the lands described, and that defendant makes claims thereto which are clouds upon that title, satisfies the calls of the statute, and is not open to the criticism that its allegations constitute mere conclusions of law. *Mitchell I. & L. Co. v. Flambeau L. Co.* 545

3. In such case, however, if the complaint in addition to the allegations called for by the statute, proceeds to allege other facts as to defendant's title, which from want of further allegation. are not shown to be invalid or ineffectual, the complaint shows affirmatively that plaintiff has no cause of action and is demurrable. *Ibid.*

4. Under sec. 1176, Stats. 1898, a complaint in an action to quiet title, which, after formal allegations sufficient to satisfy the calls of sec. 3186, Stats. 1898, alleges that defendants have received from the county clerk certain tax deeds, but makes no assertions as to their invalidity, must be read as asserting that the instruments, under which defendants claim, were executed, and contain the declarations and recitals required by law, which establish *prima facie* the regularity of all proceedings, conveying absolute title, and hence that the complaint shows upon its face that plaintiff is not entitled to the relief demanded. *Ibid.*

5. In such case, an assertion in the complaint that the tax deeds are clouds upon plaintiffs' title, is *held* not inconsistent with their entire validity. *Ibid.*

RAILWAYS.

See EMINENT DOMAIN, 1-3. NEGLIGENCE, 12. STREET RAILWAYS.

Injuries to passengers: Safe place to alight from train.

1. It is actionable negligence for a railway company to stop a train in the nighttime in such a position with reference to the depot

platform that passengers alighting, especially women, are compelled to step down, without any intermediate rest, without sufficient light to enable them to observe their surroundings, and without assistance, from the lower step of the car to the surface of the ground, a distance so great as to imperil personal safety. *Ellis v. C., M. & St. P. R. Co.* 645

2. In an action for injuries alleged to have been sustained under such circumstances, the evidence being conflicting and there being no fact within common knowledge and no undisputed fact rendering entirely unworthy of belief the plaintiff's testimony that she did not leave the seat to alight from the car until the train had stopped, it was error for the trial court to set aside a special finding by the jury in accordance with such testimony and to dismiss the complaint on the ground that plaintiff left the train while it was still in motion. *Ibid.*

Injuries to bystander: Negligence of engineer.

3. The evidence in this case is *held* to support a special finding by the jury that a torpedo which was placed upon the rail near an engine was so placed, not by the fireman, but by the engineer himself, who thereupon moved the engine over it, causing it to explode and injure the plaintiff. *Euting v. C. & N. W. R. Co.* 651

4. It is immaterial whether or not the torpedo was so placed upon the track in the conduct of defendant's business if the engineer ran the engine over the torpedo in the conduct of such business, with knowledge of its presence, under the circumstances of plaintiff's proximity and peril. *Ibid.*

5. By the explosion of a torpedo the main artery in the thigh of a boy nine years old was severed and, after healing, an aneurism developed which necessitated a serious operation, as a result of which the strength and vigor of the limb were likely to be in some measure permanently impaired. He was obliged to travel on crutches for about two years, and suffered great pain up to a time considerably beyond the operation, with some pain up to the time of the trial, three years after the injury. *Held*, that an award of $2,000 damages was not excessive. *Ibid.*

Injuries to employees: Assumption of risk: Contributory negligence.

6. The moving of railroad cars by a locomotive on a warehouse track, where the space between the side of an ordinary car and the warehouse is only about fifteen inches, is such dangerous business as to arouse the duty of the railway company to promulgate regulations requiring warning to be given by the employees in charge whenever such cars are to be moved. *Bain v. Northern Pacific R. Co.* 412

7. In such case, where there was some evidence that no regulations requiring notice or warning of the purpose to move cars on the warehouse track had ever been proclaimed by defendant, and that employees in and about the warehouse were likely to be imperiled by a sudden and unannounced movement, it is error to direct a verdict for the defendant. *Ibid.*

8. Defendant maintained a track at Duluth, Minnesota, alongside of a warehouse on which plaintiff's intestate was employed as a mason in building part of the wall of the warehouse, the wall being about fifteen inches from the side of an ordinary car standing on such track. When deceased went to work the

cars on the track were stationary and not attached to any locomotive, but the cars being suddenly and violently set in motion by defendant's engine, deceased was crushed between the warehouse and a car of more than ordinary width, and killed. There was evidence tending to show that defendant's employee, charged with duty and control of the removal of these cars, before setting them in motion, passed through the warehouse, spoke to decedent and his helpers, and observed their surroundings. *Held:*

(1) That the jury, if convinced of such facts, might have found defendant's employee guilty of negligence.

(2) That liability for such injury arose from a "risk or hazard peculiar to the operation of railroads," under secs. 2071, 5913, Gen. Stats. Minn. 1894, permitting recovery for injuries resulting from the negligence of fellow servants.

(3) That it was error to direct a verdict for defendant. *Ibid.*

9. In such case, on the evidence, it is *held* that the question of decedent's contributory negligence, and whether he assumed the risk, should have been submitted to the jury. *Ibid.*

RAPE.

1. Under sec. 4382, Stats. 1898, disabling females under the age of fourteen years from consenting to sexual intercourse, one committing such an act upon such a female, regardless of the means used to accomplish it, and of the female's consent and co-operation, is guilty of the crime of rape. *Loose v. State.* 115
2. An attempt to do the act mentioned in sec. 4382, Stats. 1898, regardless of the means resorted to and of whether the female consents or not, is an assault with intent to commit the crime of rape under sec. 4383, Id. *Ibid.*
3. The fact that a person charged with the crime of rape under sec. 4382, Stats. 1898, may instead be charged under sec. 4580 with the offense of fornication, or be charged under appropriate statutes with the crime of seduction, or incest, according to the facts, does not militate against the validity of such statutes nor the wisdom thereof, since the manifest purpose of the same is to insure adequate punishment, so far as practicable, of persons guilty of unlawful commerce with female children, avoiding the danger of their going entirely unpunished in some cases because of the severity of the penalty, or the law being endangered by the prohibition against cruel and unusual punishments,—in view of the change in the legal age of consent to fourteen years. Criticisms of the legislative policy, above indicated, made in *State v. Wentler*, 76 Wis. 89, withdrawn. *Ibid.*
4. The rule as regards the evidentiary effect of disclosure or failure to make disclosure by a female, to those in her confidence, as regards a crime of rape perpetrated or attempted to be perpetrated upon her, does not apply where the element of non-consent in respect to the offense is supplied by the statute and there is consent in fact. *Ibid.*
5. Neither does such rule apply to a person to whom disclosure is made, who delays in reporting her knowledge to others or causing legal proceedings to be instituted. *Ibid.*

6. The suggestion customarily made to juries in prosecutions for rape, that they should view the evidence of the prosecuting witness with great care, having regard for her state of mind as an injured person, and be on their guard against being moved by sympathy for her to give undue weight to the state's evidence, does not apply to a case where, though there was nonconsent by force of the statute, there was consent in fact. *Ibid.*

RATIFICATION. See ACCORD AND SATISFACTION, 3. MUNICIPAL CORPORATIONS, 6–8. SCHOOLS AND SCHOOL DISTRICTS, 3.

REAL PARTY IN INTEREST. See FACTORS. PARTIES.

REAL PROPERTY. See ADVERSE POSSESSION. ATTORNEY AND CLIENT, 2. BOUNDARIES. COVENANTS. CROPS. DEEDS. FRAUDS, STATUTE OF, 1. HIGHWAYS. LANDLORD AND TENANT. QUIETING TITLE. RES ADJUDICATA, 2, 3. TAXATION. TAX TITLES. VENDOR AND PURCHASER.

REASONABLE DOUBT. See CRIMINAL LAW, 2, 4, 5, 7, 16. HOMICIDE, 2.

RECEIPTS. See EVIDENCE, 8.

RESCISSION. See CONTRACTS, 9.

RECORDS. See EVIDENCE, 5–7. HIGHWAYS, 3.

REDEMPTION. See MORTGAGES, 2.

RELEASE.

See HIGHWAYS, 7.

In an action on contract for goods sold by plaintiff's assignor, defendant pleaded a settlement and release with the assignor prior to the assignment. The release, pleaded in the answer, after stating the relations between the assignor and defendant, contained a provision releasing defendant "of and from any and all claim or claims of every nature and description arising or growing out of any of the transactions above referred to," and it was alleged that plaintiff's claim was therein included. *Held*, that it was competent to show by extrinsic evidence that plaintiff's claim arose out of the transactions specifically mentioned in the release, and it necessarily followed that the answer stated a defense to plaintiff's cause of action. *Mandt Wagon Co. v. Fuller & Johnson Mfg. Co.* 258

REMOVAL OF CAUSES. See COURTS, 1. RES ADJUDICATA, 3.

REPAIRS. See MUNICIPAL CORPORATIONS, 10.

REPEAL OF STATUTE. See ELECTIONS, 1.

REPLEVIN.

See CHATTEL MORTGAGES, 2, 3. LANDLORD AND TENANT, 1.

1. In an action of replevin to recover two horses, the plaintiff offered evidence tending to prove that he had negotiated a purchase of defendant's farm, horses, cows, etc. that a written executory contract was signed, which however did not include the horses and cows; that plaintiff was misled into not discovering the omission until the next day when the parties were about to make conveyance and payment; that thereupon plaintiff called defendant's attention to the omission; that

defendant then said the horses and cows went with the far
and that plaintiff thereupon paid the price agreed upon a
defendant executed a deed of the farm which recited only t
it also conveyed the property mentioned in the executory w
ten agreement. Defendant, however, with the other prop
delivered to the plaintiff possession of the horses and co
but about two weeks later came and took away the horse
question. *Held:*

(1) That the evidence should have been admitted, sinc
tended to prove an executed transfer of the horses on the
the deed was delivered, and the deed, in its very nature,
not an attempted expression of the whole contract, but
execution of the whole or a part of the defendant's
thereof.

(2) That plaintiff's claim that the written executory a
ment was not in accordance with the oral understanding
a sufficient consideration to support the transfer of the art
not mentioned therein. *Lathrop v. Humble,*

2. In an action of replevin the defendant claimed under a ch
mortgage executed by plaintiff's son, and introduced evid
to the effect that plaintiff herself represented that the
erty belonged to the son. This was contradicted by the plai
The jury, in answer to specific questions of a special ve
found that plaintiff did not knowingly permit the son to
out or represent to the defendant, without objections or
part, that the son was the owner of the property, and tha
defendant, at the time of taking the chattel mortgag
lieved that the son owned the property and acted thereon.
that the special verdict was incomplete in that it contain
finding as to whether the plaintiff held out, declared, c
mitted the property belonged to her son. *Strasser v. Gol*

3. Such verdict is further incomplete in that it contained no
ing as to whether plaintiff knew, or ought reasonably to
anticipated, that defendant might, in reliance on her
ment, act to his injury, where there was evidence from
the jury might have drawn the inference that the pl
ought reasonably to have anticipated that defendant
her a question as to the ownership of the property for
material purpose, and was likely to act in reliance up
belief in the son's ownership.

4. In such case, it is error to refuse to permit defendant to
that he did rely on plaintiff's statement as to the own
of the property in taking his chattel mortgage. Defer
mental process was a fact as to which his direct eviden
admissible, notwithstanding it might also be establisl
refuted by inferences from the circumstances and his c

5. Where the plaintiff has taken possession of the property
pute under a writ of replevin, and defendant claims th
by virtue of a chattel mortgage given by plaintiff's son
circumstances which may amount to an estoppel, it is e
exclude evidence as to the necessary expenses incurred
fendant in seizing and reclaiming the property after tl
been transferred by the son to a purchaser, since, if th
gage is valid against the plaintiff, such expenses might
terms, be realized out of the mortgaged property, and

and if he uses more than such quantity he makes the goods his own and loses the right of rejection. *Zipp Mfg. Co. v. Pastorino,* 176

2. Where the unsound condition of a horse at the time of purchase is vital to the defense of breach of warranty, it is error to exclude evidence, tending to show, that the same unsoundness existed nine months prior to the purchase and continuously thereafter down to the sale. *Kavanaugh v. Wausau,* 611

3. In such case, the evidence of the unsound condition at the early date cannot be said to be too remote. *Ibid.*

SATISFACTION. See ACCORD AND SATISFACTION. ARBITRATION. COMPROMISE AND SETTLEMENT. COSTS.

SCHOOLS AND SCHOOL DISTRICTS.

See CONSTITUTIONAL LAW, 1, 2.

1. Ch. 160, Laws of 1903, legalizing an attempted organization of a school district, was enacted during the pendency of an appeal from an order overruling a demurrer to a complaint demanding judgment that such school district had no existence, and is *held* to be a valid enactment, and that effect must be given to its retrospective provisions. *State ex rel. Vandenhouten v. Vanhuse,* 15

2. In an action to obtain judgment that a school district has no existence, and to exclude defendants from acting as school officers therein, the school district itself should be joined as a party defendant. *Ibid.*

3. Sec. 432, Stats. 1898, governing common schools, provides that no act authorized to be done by the board shall be valid unless voted at its meetings, and sec. 436, provides that all purchases shall be approved at a regular meeting of the board at which all the members are present. The clerk and director of the defendant district met plaintiff's agent on the highway, agreed with the latter to purchase of the plaintiff for the district certain supplies, and gave a school order therefor. No meeting of the school board, nor approval of the purchase at a meeting of the school board was had. Plaintiff's agent, in discharge of the contract, left the supplies at the district school house, without the knowledge of the district officers, and thereafter the annual district meeting repudiated the transaction. *Held:*

(1) That the school order, and the agreement on which it was based were invalid.

(2) That nothing short of some affirmative corporate action by the district would constitute ratification of the transaction.

(3) That neither mere silence of the district officers, nor the depositing of the supplies in the district school house, and their subsequent use, constituted a valid ratification. *Caxton Co. v. School District,* 374

SCHOOL ORDERS. See SCHOOLS AND SCHOOL DISTRICTS, 3.

SECONDARY EVIDENCE. See DAMAGES, 9. EVIDENCE, 3–5. HIGHWAYS, 3.

SECURITY FOR COSTS. See JUSTICES' COURTS, 5.

SETTLEMENT. See ACCORD AND SATISFACTION. COMPROMISE AND SETTLEMENT. COSTS, 4. RELEASE.

SERVICE OF PROCESS. See INSURANCE, 4. JUDGMENTS. JURISDICTION.

SHERIFFS.

See CONSTITUTIONAL LAW, 3. COUNTY BOARD, 2.

1. An action in the nature of an action for money had and received can be maintained by a county against a sheriff to recover money paid to and received by him, in good faith, under a mistake of the law by all the interested parties. *Douglas Co. v. Sommer*, 424

2. Where a sheriff's compensation was by salary in lieu of all fees and compensation for services within his county, except for keeping and maintaining prisoners in the county jail, an allowance and payment to the sheriff of items for street car and railway fare of prisoners, in transporting them to and from the county jail, workhouse and the courts is unlawful, and the county can recover such amounts from the sheriff. *Ibid.*

3. In an action against a sheriff to recover moneys illegally paid to him, it is error to include in the recovery against the sheriff items paid to a deputy sheriff under the sheriff's appointment, where the claim was presented to the county board in the deputy's name, and was audited, allowed, and county orders issued to the deputy, and paid to him personally. *Ibid.*

4. To allow and pay a sheriff for services and disbursements in apprehending and returning fugitives from justice from without the state, without obtaining the certificate required by sec. 2, ch. 126, Laws of 1901, before the services were rendered, and for services in the unsuccessful pursuit of fugitives from justice within the state outside the sheriff's county, without having the certificate of the district attorney required by subd. 34, sec. 731, Stats. 1898, and without proof before the county board that the escape or pursuit were not the result of, or made necessary by the sheriff's carelessness or negligence, is an abuse of power by the county board, and their action is void. *Ibid.*

5. Where, in an action on implied *assumpsit* by a county against a sheriff to recover sums of money illegally paid him, it appeared that he had been paid in county orders, worth ninety per cent. of their face value, and that the sheriff realized only that amount thereon, the measure of recovery is the amount of money actually received by the sheriff, and not the face value of the county orders. *Ibid.*

6. Under ch. 217, Laws of 1901, a resolution of the county board, in effect, that the *present* method of paying the sheriff a salary for work done within the county, and fees for work done outside the county, be changed in pursuance of said ch. 217, followed by a report of a committee of the board, that *thereafter* the sheriff "be paid a salary for all work of every kind—civil and criminal—inside and outside" the county, "and outside the state," and prescribing the salary so as to effect the change, which report was adopted in pursuance of ch. 217, is not ambiguous, and applied to the sheriff in office when the resolution took effect. *State ex rel. Sommer v. Erickson*, 435

7. Ch. 217, Laws of 1901, expressly gives the power to make the changes therein specified to "the county board of *any* county," and is expressly made to "apply to *all* sheriffs, including those" then holding office. *Held*, that the purpose of said act was to give power to the county board of every county of the state

to make the changes therein authorized, including a county which, under sec. 694*a*, S. & B. Ann. Stats., had changed from the fee system to a salary for services rendered the county within its limits, and had left the sheriff to be compensated for other services by fees as theretofore. *Ibid.*

8. Under ch. 217, Laws of 1901, the county board is at liberty to fix a salary which shall be in addition to lawful disbursements, as well as a salary which should include such disbursements. *Ibid.*

SIDEWALKS. See DAMAGES, 15. MUNICIPAL CORPORATIONS, 9–14. TRIAL, 15.

SOVEREIGNTY. See BOUNDARIES.

SPECIFIC PERFORMANCE. See COMPROMISE AND SETTLEMENT, 2.

SPECIAL VERDICT. See APPEAL, 30. CONSTITUTIONAL LAW, 7. FRAUD, 1, 2. HIGHWAYS, 11, 14. INSURANCE, 7. REPLEVIN, 2, 3. TRIALS, 5, 14–20.

SPRINKLING STREETS. See MUNICIPAL CORPORATIONS, 3, 4.

STANDARD POLICY. See INSURANCE, 9–16.

STATES. See BOUNDARIES.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See DEEDS, 3. FRAUDS, STATUTE OF, 3. LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. CORPORATIONS, 1. ELECTIONS, 2, 3. EMINENT DOMAIN. HABEAS CORPUS, 1. RAPE, 3.

Construction. See ACTION, 2, 3. APPEAL, 2, 4, 5. CONSTITUTIONAL LAW, 1–3. CORPORATIONS, 2–5. ELECTIONS. EMINENT DOMAIN, 1, 3. EXECUTORS AND ADMINISTRATORS, 2–4. FACTORS, 5. FALSE PRETENSES, 1. FRAUDS, STATUTE OF. HABEAS CORPUS, 1. HIGHWAYS, 1, 4–6. INSURANCE, 4, 8. JUSTICES' COURTS, 2, 3. LIMITATION OF ACTIONS, 2. MUNICIPAL CORPORATIONS, 1, 3, 4, 9–11. QUIETING TITLE, 2, 4. RAPE, 1–3. SCHOOLS, 1, 3. SHERIFFS, 4, 6–8. TAXATION, 2, 5, 7, 8. TAX TITLES, 1, 3. TELEPHONES, 1. TOWNS. WITNESSES, 5.

Repeal. See ELECTIONS, 1.

Mandatory or directory? See EXECUTORS AND ADMINISTRATORS, 2.

Retrospective. See CONSTITUTIONAL LAW, 1. CORPORATIONS, 2. SCHOOLS AND SCHOOL DISTRICTS, 1.

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.			SESSION LAWS.		
Art.	I, sec. 12	285	1887. Ch.	193	123, 127, 128
"	III, secs. 1, 3, 6	212	1889. "	368	128
"	IV, sec. 18	15, 18	1891. "	195	463, 464, 466
"	IV, secs. 23, 26	436, 442	1891. "	350	128
"	IV, sec. 31	19	1893. "	249	212
"	IV, secs. 31, subds. 7, 8	15	1893. "	288	212
"	VI, sec. 4	212	1895. "	370	128
"	VII, " 23	346, 348	1897. "	312	203, 213

STATUTES CITED, ETC.—con.

SESSION LAWS—con.

1899. " 151 - - - - 439
1899. " 178 - - - 471, 474
1899. " 253 - - - 573, 575
1899. " 341 203, 204, 211, 213, 215–219, 221
1899. " 341, sec. 12 - - 214
1899. " 349 203, 204, 214, 217, 218
1899. " 351 - - - 203, 218
1899. " 351, sec. 2 - - 215
1901. " 126, sec. 2 - 424, 432
1901. " 217 - - 435, 438–441
1901. " 217, sec. 1 - - 438
1901. " 217, " 2 - - 439
1901. " 217, " 3 - - 438
1901. " 399 - - - - 284
1901. " 457 - - 204, 215, 218
1901. " 465 - - - 477, 484
1903. " 1 - - - - 358
1903. " 160 - - - 15, 17, 21
1903. " 446 - - - - 353
1903. " 448 - - - - 416

REVISED STATUTES OF 1849.

Ch. 133, sec. 2, p. 682 - - 538

REVISED STATUTES OF 1858.

Ch. 164, p. 928 - - - - 538

REVISED STATUTES OF 1878.

Section 1267 - - - - 252

S. & B. ANNO. STATUTES.

Section 694*a* - - 435, 439, 440
" 2760, subd. 5 - - 596
Sections 3721–3723*b* - - 596

STATUTES OF 1898.

Sections 11*a*–11*i* - - 203, 213
" 11*a*–94*j* (ch. 5) 216–219
" 12 –94*j* - - - 212
Section 30 - 203, 204, 213–218
" 31 - - 203, 214, 215
" 35 - - - - 215
Sections 36–38 - - - 204
Section 40 - - 203, 204, 214
" 41 - - 203, 214, 215
Sections 412–420 - - - 20
Section 417 - - - - 20
Sections 432, 436 - - 374, 375
" 670, 671 - - 574, 575
Section 671*a* - - - 573, 575
" 683 - - - 392, 393
" 694 - - - - 438
" 731, subd. 34 - 424, 432
" 742 - - - - 556

STATUTES OF 1898—con.

Section 925—52, subd. 40 396, 297, 299, 301
" 925—88 - - 485, 491
" 925—125 - - - 475
Sections 925—172 to 925—200 300
Section 925—175 - 299, 470, 474
Sections 925—175 to 925—197*a* 297, 300
" 925—201 to 925—207 470, 474, 475
Section 925—204 - - 471, 474
Sections 926 to 926—16(ch. 40*b*) 297, 301
Section 926—10 - 297, 301
" 1037*a* - - - - 587
" 1040 - - - 310–312
" 1047 - - - 184, 188
" 1101 - - - - 579
Sections 1102, 1105 - - 576, 584
" 1130, 1132 - - 58, 61
Section 1141 - - - - 61
" 1176 - - 372, 546, 548
Sections 1187, 1188 - - 369, 372
Section 1210*h* - - - 184, 189
" 1265 - - - - 609
" 1267 - 245, 251, 252, 609
" 1268 - - - 252, 609
" 1269 - 250, 253, 609, 610
" 1270 - - - - 253
" 1283 - - - 609, 610
" 1294 - - - 99, 100
" 1298 - - - 245, 250
" 1331 - - - 68, 70
" 1339 - 380, 383, 387, 456
Sections 1411, 1412 - - - 154
Section 1414 - - - - 155
Sections 1770*a*–1770*e* - - 284
Section 1770*b* 281, 282, 284–287, 602, 603
Sections 1771–1791*m* (ch. 86) - 477, 481
" 1775, 1775*a* - 170, 175
" 1792–1864*a* (ch. 87) 477, 481
" 1862, 1863 - - - 477, 481
Section 1941—57 - - - 470
" 1941—62 - - 465, 466
" 1977 - - 456, 460, 466
Sections 2194, 2195 - - 45, 46
Section 2241 - - - - 109
" 2270 - - - - 269
" 2289 - - - - 269
" 2302 - - - 45, 54
" 2304 - - - 27, 29, 31
" 2307 - - - - 567
" 2308 - - - 314, 323
Sections 2313, 2314 - - - 40

STATUTES OF 1898—con.

Section 2605 - - - - 409
" 2607 - - 406, 408–410
" 2637, subd. 9 - 359, 366
" 2646 - - 274, 335, 547
" 2647 - - - 172, 559
" 2654 - - - - 368
Sections 2668, 2675 - - - 274
Section 2768 - - - - 305
" 2815 - - - 346, 348
" 2829 - - - 268, 588
" 2830 - - - - 10
" 2832 - - - - 396
" 2853 - - - - 527
" 2858 - - - - 402
Sections 2870, 2871, 2873 - - 45
Section 2882 - - - 393, 665
" 2942 - - - - 44
" 3039 - - - - 393
" 3043 - - 390, 392, 395
" 3043 - - - - 349
" 3048 - - - - 394
" 3069 - - - - 393
" 3069, subd. 1 - 663, 666
" 3070 - - - - 556
Sections 3162, 3165 - - - 557

STATUTES OF 1898—con.

Section 3186 - - - 545–547
" 3200 - - - - 504
" 3764 - - - 22, 25, 26
Sections 3765, 3766 - - 22, 25
Section 3807 - - 377, 379, 380
" 3807, subd. 2 - 377, 379
" 3819 - - 377, 379, 380
" 3979 - - - - 644
" 4022 - - - - 32
Sections 4068, 4069 - - 628, 632
" 4211, 4212 - - - 107
Section 4231 - - - - 366
Sections 4232, 4233 - - - 367
Section 4234 - 359, 362, 366, 367
" 4255 - - - - 415
" 4381 - - 123, 126–128
" 4382 - 116, 123–129, 131
" 4383 116, 123, 124, 129, 131
Sections 4397, 4397*a* - 33, 35
Section 4423 - - - 135, 138
" 4580 - - 116, 123, 131
" 4588*a* - - - 123, 131
" 4591*a* - - - - 131
" 4978 - - - - 285

STREETS. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 1, 3, 4, 9–14. NEGLIGENCE, 14, 15.

STREET RAILWAYS.

See EMINENT DOMAIN, 1–3. NEGLIGENCE, 12.

In an action against an electric railroad company operating an interurban line, for the negligent killing of plaintiff's intestate in a collision with a runaway team at a highway crossing, the complaint charged that the defendant's agents wantonly and wilfully ran the deceased down, with such gross negligence as to amount to an intention on their part to inflict injury to the deceased. The action was tried on the theory that these facts must be shown. *Held*, on the evidence, stated in the opinion, that the case presented was one for the jury, and that the direction of a verdict for defendant was erroneous. *Wilson v. Chippewa Valley E. R. Co.* 636

STIPULATIONS. See ACCORD AND SATISFACTION, 3, 4. HIGHWAYS, 8.

SUBSEQUENT PURCHASERS. See ADVERSE POSSESSION, 2, 3.

SUICIDE. See INSURANCE, 1, 2, 6–8.

SUMMARY PROCEEDINGS. See CONSTITUTIONAL LAW, 4–6.

SUNDAY. See CONTRACTS, 6.

SUPREME COURT.

See APPEAL. COSTS, 2.

1. The busines of the supreme court is confined to the exercise of its appellate jurisdiction, except in cases of applications where,

"for peculiar and satisfactory reasons . . . they are not or cannot be made elsewhere." *In re Mielke,* 501

2. The term "cannot be made elsewhere" refers to disability as to jurisdiction. *Ibid.*

3. The term "peculiar and satisfactory reasons" refers to those circumstances rendering the exercise of jurisdiction elsewhere in the given case inadequate to remedy or prevent the wrong,—insufficient to afford any substantial remedy. *Ibid.*

4. Mere importance of obtaining a speedy final settlement of a controverted question, even of a public nature, short of necessity in that regard to prevent irremediable loss of valuable rights, does not satisfy the call for peculiar and satisfactory reasons. *Ibid.*

5. In the foregoing sense the rule as to the exercise of original jurisdiction here to review or control the conduct of other courts, the rule is that this court will not exercise such jurisdiction "when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort." *Ibid.*

6. To the foregoing, in conformity to legislative policy, an exception is made as to actions against the state involving its revenues. *Ibid.*

SURFACE WATER. See HIGHWAYS, 15, 16.

SURVEYS. See WATERS.

TAXATION.

See TAX TITLES.

Levy and assessment. See MUNICIPAL CORPORATIONS, 2–4.

1. The failure of an assessor to assess real estate in the name of the true owner is *held* insufficient to render the assessment void, where the circumstances indicate that the assessor might readily have believed that the party assessed was the owner; that the tax was a proper one, and that the owner had knowledge of the assessment, levy, and delinquent sale. *N. Boyington Co. v. Southwick,* 184

2. A variance between the description of a city lot in the assessment roll and in the delinquent tax return consisted in the omission from the latter of the abbreviation "ft." after the figures indicating the dimensions of a portion of the lot excepted from the assessment. The unit of measurement when the lot was platted was feet, and the uncertainty could easily have been made certain by referring to the deed under which the owner claimed, or by inference from contemporaneous conditions, such as occupancy. *Held,* that the descriptions indicated the land with ordinary and reasonable certainty within the meaning of sec. 1047, Stats. 1898. *Ibid.*

3. Describing land in the assessment roll as being in the "original plat" instead of S., E. & O.'s plat, as the fact was, is *held* not to have been such an error as would avoid the tax proceedings, where the evidence showed that such plat was the first plat of the city, and was commonly referred to as the original plat.

in conveyances and former assessments, and that such fa
were known to the owner when the tax proceedings were h
It

4. Where a conveyance of a portion of a city lot was in fact a m
gage, and contained a provision that the grantor should
the taxes, a subsequent assessment of the entire lot to
grantor would not render the assessment void. *I*

5. Failure to assess land in the name of the true owner; desc
ing city lots in the assessment roll under the wrong plat na
and assessing an entire lot to one person where he only ow
a portion of it, unless shown to have been immaterial by rea
of other facts and circumstances, are defects which go to
validity of the assessment and affect the groundwork of
tax. The limitations of sec. 1210*h*, Stats. 1898, therefore ap
I

6. An immaterial variation between the description of a trac
the assessment roll and the delinquent return is not a de
which goes to the validity of the assessment and affects
groundwork of the tax. *I*

7. Plaintiff, a foreign corporation dealing in cedar posts and p
had its yards and a resident agent at New London, in O
gamie county. On the first of May it owned a quantit
cedar posts and poles cut and piled at Aniwa, in Shaw
county, where it inspected and pealed them, and then g
ually shipped them as cars could be obtained, mostly to
New London yard, but some directly to purchasers as or
were received at its New London office. Sec. 1040, Stats. 1
provides that the personal property of a foreign corpora
having an agent residing in this state, shall be assesse
the district where the agent resides; that "merchants' g
wares, and commodities kept for sale . . . shall be asse
in the district where located;" that saw logs and timber w
are to be sawed or manufactured in this state by or for
owner shall be assessed in the district where the mill i
cated, and that saw logs, etc., and other articles not b
manufacturer's stock, shall be assessed in the district w
the owner or agent in charge resides. Plaintiff returne
property at Aniwa for assessment and taxation at New Lon
but it was also assessed, and taxed as merchants' stoc
Shawano county. Plaintiff paid the taxes so levied in Sha
county under protest, and brought suit to recover them
Held, that such poles and posts were merchants' goods, w
and commodities, and were "kept for sale" in Shawano co
within the calls of said sec. 1040, and hence taxable there.
entine-Clark Co. v. Shawano Co.

Same: Collection and enforcement against personal property.
EQUITY, 2.

8. To support a judgment under sec. 1105, Stats. 1898, it shoul
pear that all the issues specified in sec. 1102 were foun
the plaintiff, or that defendant failed to appear and an
relevant questions. *Washburn v. Washburn W. W. Co.*

9. The franchise, land and chattels of a public service corpor
constitute one indivisible thing for the purposes of tax
The franchise is personal property, and all things of a pr
tary nature connected therewith, whether land or mov
partake of its character, and the value of that which i

ated by the combination of tangible and intangible things forms the legitimate basis for taxation. That is so, generally, by settled judicial policy, and so by statute as to waterworks property. *Ibid.*

10. A finding that when the taxes were assessed defendant owned property of the character above mentioned is equivalent to a finding that it owned property of some description sufficient to pay the taxes in question or some part thereof, though such property be not subject to seizure upon execution or tax warrant. *Ibid.*

TAX TITLES.

See COVENANTS. JUDGMENTS. QUIETING TITLE, 4, 5.

1. Sec. 1130, Stats. 1898, requires that the county treasurer, before any tax sale, post up notices thereof in at least four *public places* in his county, and sec. 1132 provides for proof thereof, by affidavit, to be preserved and filed in the office of the county clerk. An affidavit made by such an officer omitted to state in what county such posting was done, but stated that notices were posted "in a conspicuous place" at the corner at the intersection of designated streets of a city, naming five such corners. *Held:*
   (1) That the affidavit was defective in omitting to state in what county such posting was had.
   (2) That *a conspicuous place* at a street corner is not necessarily a *public place* within the calls of the statute
   (3) That the irregularities and omissions in the affidavit rendered the sale and tax deed issued thereon void. *Myrick v. Kahle,* 57

2. In such case, after the record had been made up and filed, the county treasurer cannot amend the affidavit for the purpose of showing compliance with the statute in the posting of notices, and it is error to receive such amended affidavit in evidence. *Ibid.*

3. Plaintiff, grantee under a tax deed fair on its face but voidable for irregularities, which had been duly recorded more than three years before the action was commenced, brought action to quiet title against the holder of a subsequent tax deed fair on its face but voidable for irregularities, which had not been recorded three years. The lands had been at all times vacant and unoccupied. Plaintiff's deed had not been recorded full three years before the recording of defendant's deed. *Held,* that plaintiff's title had become perfect by force of secs. 1187, 1188, Stats. 1898, prior to the bringing of the action. *Cezikolski v. Frydrychowicz,* 369

TELEPHONES.

See ELECTION OF REMEDIES.

1. Under secs. 1775 and 1775*a*, Stats. 1898, one telephone company may take, own, hold and enjoy any right, privilege, or franchise theretofore owned by another such company. *Badger Telephone Co. v. Wolf River Telephone Co.* 169

2. Where possession of the property of one corporation had been fully delivered to and received and accepted by another, which

retained the property and had the use thereof for years, the latter, in an action against it to recover the value of such property, is estopped from claiming any want of authority in the board of directors of the former to make the transfer through one of its officers. *Ibid.*

TENDER. See ACCORD AND SATISFACTION, 3, 4. BUILDING CONTRACTS, 4.

TORPEDOES. See RAILROADS, 3, 4.

TOWNS.

See ACTION. HIGHWAYS, 15, 16.

Ch. 253, Laws of 1899, declared in its title to be incorporated into the statutes as sec. 671*a*, relating to the powers of county boards to vacate towns, after describing the petition required, and the manner of holding an election thereon, provides, that in case the majority of votes cast are in favor of the vacation, and that fact properly certified by the county clerk, the county board "shall have power to vacate" such town. *Held*, that it was the legislative intent that ch. 253, should, with secs. 670, 671, Stats. 1898, form a complete and harmonious system, governing the powers of county boards in relation to vacating towns, and that an ordinance vacating a town passed by a county board without complying with any of the provisions of ch. 253, is void. *State ex rel. Jensen v. Yankee*, 573

TRIAL.

Continuance. See CONTINUANCE.

Course and conduct in general. See CRIMINAL LAW. HIGHWAYS, 8. WITNESSES.

Same: Jury: View of premises. See APPEAL, 14.

Same: Misconduct of jury. See NEW TRIAL, 1.

Same: Separation and exclusion of witnesses. See WITNESSES.

Reception of evidence. See FALSE PRETENSES, 5–9. INSURANCE, 5–7. LANDLORD AND TENANT, 7–12.

1. In an action to recover a balance alleged to be due for goods sold and delivered to defendant at its request, a complaint framed after the form of common counts is sufficient to warrant admission of evidence that the goods were delivered to a third person on account of defendant. *Andresen v. Upham Mfg. Co.* 561

Argument and conduct of counsel.

2. Where a claim has been fully argued by plaintiff in his opening, the refusal of the trial court to permit defendant to discuss it after plaintiff's closing argument, it being asserted by defendant that plaintiff had therein taken a new position, sustained on appeal. *Schmitt v. Northern Pacific R. Co.* 397

Instructions to jury. See APPEAL, 6, 15, 24. BUILDING CONTRACTS, 1. CRIMINAL LAW, 4–16. FALSE PRETENSES, 3, 4. FRAUD, 4, 6. INSURANCE, 18. MASTER AND SERVANT. RAPE, 6. TRIAL, 10, 19.

3. An appellant waives any mere omission to instruct the jury upon any given subject by failure to present, *in writing*, request for such instruction. *Taylor v. Seil*, 32

4. It is not the duty of the court, nor is it proper as a general rule, upon request or otherwise, to point out to the jury the evidence of any particular witness upon a disputed matter, giving particular significance thereto and stating how it should or should not be viewed as regards the truthfulness thereof. *Loose v. State,* 115

5. The instructions to the jury in respect to questions for a special verdict should be directed thereto specifically and be confined to such explanation thereof and the law in respect thereto as to enable the jury to intelligently answer them, having regard to the burden of proof, care being exercised not to suggest, as to any question, the effect of the answer thereto upon the ultimate rights of either party. *Schrunk v. St. Joseph,* 223

6. Specific error for failure to instruct on the questions at issue can be assigned only upon refusal to give an instruction formally requested in writing. *Fosha v. O'Donnell,* 336

7. A requested instruction, so framed that in any reasonable view it assumes a state of things as established by the evidence not so established beyond room for reasonable debate, is fatally defective. *Cupps v. State,* 504

8. If counsel desire a specific instruction on any particular point, they should prepare such instruction in writing in the form they desire it to be given to the jury, and ask the court to give it. As a general rule a mere request to charge upon a particular point, or to charge more particularly thereon, a refusal thereof and an exception to the ruling, do not present any question for review. *Ibid.*

9. Where a decision in plaintiff's favor depends largely on the weight to be given to his testimony, it is prejudicial error to refuse a requested instruction, in substance, that in judging of the credibility of plaintiff's testimony, the jury may properly consider his interest in the result of the trial, the temptation under the circumstances to color his testimony favorably to himself, and everything bearing on the subject, and give such evidence such weight only as in their judgment it was entitled to, and that a like test should be applied to the evidence of each of the witnesses who testified in the case, unless such principle is embodied in the general charge. *Kavanaugh v. Wausau,* 611

10. Such instruction does not invade the province of the jury, or violate the rule that, in instructions to the jury, the evidence of one witness should not be singled out and given prominence by special comment thereon. *Ibid.*

11. Defendant requested an instruction, which called attention to the interest of the plaintiff and the duty of the jury to consider such interest in passing on the credibility of her testimony, closing with the direction: "You are also to subject all the testimony of all the witnesses to the same test," which was refused. The court gave general instructions that the interest of all witnesses was to be considered and whether such interest affected their testimony. *Held,* that while the requested instruction stated a correct rule of law, its refusal was proper, when it appeared that plaintiff was not the only interested witness, and the instruction might have erroneously impressed the jury to have discriminated her from the others.

Kavanaugh v. Wausau, ante, p. 611, distinguished. *Strasser v. Goldberg*, 621

12. Where on the trial of a cause witnesses are contradicted, either by their own statements or by other testimony, and the court fails to give any instructions whatever upon the right of the jury to disregard the uncorroborated testimony of a witness whom they believe to have wilfully sworn falsely to any material matter, it is error to refuse a correct requested instruction as to the rule of *falsus in uno, falsus in omnibus*. *Ibid.*

Taking case from jury: Dismissal or non-suit. See INSURANCE, 1. MASTER AND SERVANT.

Same: Direction of verdict. See APPEAL, 7, 10, 24. CRIMINAL LAW, 9. HIGHWAYS, 13. INSURANCE, 1. MUNICIPAL CORPORATIONS, 6. NEGLIGENCE, 1, 9, 11, 16. RAILROADS, 2, 7, 9. STREET RAILWAYS.

13. It is error to direct a verdict where, on the evidence actually admitted, the jury might have found facts to warrant some recovery. *Kelley, Maus & Co. v. La Crosse Carriage Co.* 84

Special verdict. See APPEAL, 30. CONSTITUTIONAL LAW, 7. FRAUD, 1, 2. HIGHWAYS, 11, 14. INSURANCE, 7. REPLEVIN, 2, 3. TRIAL, 5.

14. The findings of a special verdict should be interpreted so as to harmonize with each other if it is reasonable to do so under the facts and circumstances of the case. *Ruscher v. Stanley*. 380

15. When, in an action for personal injuries, in answering one question of a special verdict the jury find that the sidewalk in question was defective, and by the answer to another question that the defendant was injured thereon as a natural and probable result of the defective condition, and that the city officers should have anticipated such an injury might result from the defect, the latter finding necessarily implies that the sidewalk was not reasonably safe for public use. *Ibid.*

16. Where counsel did not make it clear to the trial court, or opposing counsel, that a special verdict was requested, but put his request in such a way that it might easily be misunderstood, and did not correct the misunderstanding when it must have been apparent, he is estopped from claiming, on appeal, that his request was different from that which the trial court understood it to be. *Schmitt v. Northern Pacific R. Co.* 397

17. All that is necessary to secure the right to the submission of a special verdict is to make oral request therefor at the close of the evidence. *Ibid.*

18. A written request commencing: "Now comes the defendant in the above entitled action and moves and requests the court to submit to the jury herein for answer *and as a special verdict* the following questions," together with the facts in connection therewith, shown by the record, considered, and *held* to be simply a request to submit certain questions. *Ibid.*

19. In such case, it is not error to submit a general verdict, and charge the jury generally as to the legal effect of its answers to special questions. *Ibid.*

20. Where, on a specific question submitted as part of a special verdict, the evidence is conflicting, it is not error to refuse to change the answer of the jury and for judgment in accordance with the requested change. *Strasser v. Goldberg*, 621

Trial by court: Findings. See APPEAL, 20, 23. EQUITY, 3–5. TAXATION, 10.

21. In an action on implied contract for goods delivered to a third person at defendant's request, a general finding, following the allegations of the complaint, that the sale and delivery was to defendant, necessarily involves a promise, express or implied, upon the part of defendant to pay for the property. *Andresen v. Upham Mfg. Co.* 561

TRANSITORY ACTIONS. See ACTION, 4, 5.

TRESPASS. See HIGHWAYS, 1, 8.

TRUSTS AND TRUSTEES. See FACTORS, 5. VENDOR AND PURCHASER, 1. WILLS, 1.

UNDUE INFLUENCE. See EQUITY, 3–5. WITNESSES, 5.

USAGE. See DAMAGES, 8.

USER. See HIGHWAYS, 1.

VACATION OF TOWNS. See TOWNS.

VALUE. See CONTRACTS, 1, 9–11. DAMAGES, 2, 3. LANDLORD AND TENANT, 6–12.

VARIANCE. See TAXATION, 2, 3, 6.

VEGETABLES. See CROPS. LANDLORD AND TENANT, 1–4.

VENDOR AND PURCHASER OF LAND.

1. An action in equity to enforce the equitable right to a lien for unpaid purchase money on realty conveyed in consideration of support and maintenance of the grantors in old age, is not a suit to enforce a parol trust in land, nor is it an action for a forfeiture of the title for breach of condition subsequent. *Halvorsen v. Halvorsen,* 52

2. The true consideration for a conveyance of land can always be inquired into by parol. *Ibid.*

3. A vendor of realty has an equitable right to have the unpaid consideration therefor, by the action of a court of equity, made a lien thereon, and to have the use of its jurisdiction to enforce the same as justice may require. *Ibid.*

4. The equitable right to a vendor's lien is not an interest in land in advance of the judgment of the court creating it. It is a right merely to demand the use of equity jurisdiction to enable the vendor to acquire an interest. *Ibid.*

VENDOR'S LIEN. See VENDOR AND PURCHASER.

VERDICT. See APPEAL, 7, 24. HIGHWAYS, 13. INSURANCE, 1. MUNICIPAL CORPORATIONS, 6. NEGLIGENCE, 1, 11. RAILROADS, 7, 9. STREET RAILWAYS. TRIAL, 14–20.

VIEW OF PREMISES by jury. See APPEAL, 14.

VOLUNTEER. See GUARDIAN AND WARD.

WAIVER. See HIGHWAYS, 7. INFANTS. INSURANCE, 1–3, 11, 21. TRIAL, 3.

WANTON INJURIES. See NEGLIGENCE, 12. STREET RAILWAYS.

WARDS. See GUARDIAN AND WARD. INFANTS.

WARRANTY. See COVENANTS. LANDLORD AND TENANT, 1. SALES, 2, 3.

WATERPOWERS. See DEEDS, 1, 2.

WATERS.

See BOUNDARIES. DEEDS. HIGHWAYS, 15, 16.

1. Unsurveyed islands in navigable rivers in this state are presumed to be appurtenant to the surveyed land near by, within the limits of which they fall as regards riparian rights, and, nothing appearing to the contrary, such an unsurveyed island is presumed to pass with a conveyance of the surveyed land to which it is so appurtenant. *Franzini v. Layland,* 72
2. In case of a mistake in making the public land surveys, by omitting to survey any island in a river, such mistake can be taken advantage of only by the government, by proper proceedings to be relieved therefrom upon the same ground that any other proprietor might be relieved under the same circumstances. Until it acts in the matter the island will be deemed to be governed by the rule above stated. *Ibid.*

WATERWORKS. See MUNICIPAL CORPORATIONS, 2. TAXATION, 9, 10.

WIDOW. See EXECUTORS AND ADMINISTRATORS, 2, 3.

WILFUL INJURY. See NEGLIGENCE, 12. STREET RAILWAYS.

WILLS.

Construction.

1. A testator, after reciting that "having in mind the *many catastrophies resulting from the action of the elements and the great suffering, distress, famine and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes,* and having a desire to do what I can to relieve the same," bequeathed to trustees a certain part of his estate to be invested and the income annually expended for the charitable purpose of "relieving the wants, distress, and suffering arising from *such* causes, and for the purpose of aiding and assisting . . . the victims of *such* accidents and catastrophies." The testator further recited that he placed no restriction upon the trustees as to the locality where said moneys should be expended, but enjoined them "to select subjects worthy of assistance" and to use their best judgment and prudence in so handling and disbursing said moneys that the same "may be of the greatest possible benefit to suffering humanity." *Held:*
   (1) That the bequest was not to charity generally, but defined a class of beneficiaries with such definiteness as would enable the court to determine whether any concrete expenditure was within the scheme of the testator.
   (2) That the terms of the bequest did not vest in the trustees discretion to disburse the income to individuals subjected merely to some property loss from some of the defined causes, who were not in pecuniary need and not subjects of public charity, but their discretion was restricted to those subjects fairly entitled to relief in effectuating the testator's general motive and purpose as declared in the bequest. *Kronshage v. Varrell,* 161
2. A testator gave his estate to his wife for life, and on her death to his eldest daughter for life, and provided that after her death "such portion of my said estate as may remain shall be equally divided between my lawful heirs." *Held,* that the tes-

tator meant by the term "my lawful heirs" those persons who at his death would by law have been entitled to inherit his intestate estate. *In re Cowley's Will,* 263

WITNESSES.

See CRIMINAL LAW, 6, 13. EVIDENCE, 6, 7. MASTER AND SERVANT. RAPE, 5. TRIAL, 4, 9–12.

1. The placing of witnesses in a judicial trial under a rule as regards their presence in court other than when giving their testimony, until that shall have been given, and as regards communicating with each other till they shall have testified, is wholly a matter of judicial discretion. *Loose v. State,* 115

2. If a witness put under a rule, as stated in the last paragraph, violates the same, it does not furnish any legitimate ground for the exclusion of his evidence if the party calling him is an innocent party in the matter. *Ibid.*

3. In case of a violation of a rule as mentioned in the preceding paragraph, the person calling the witness being innocent in the matter, punishment for the transgression should be confined to the witness himself, as for a contempt of court. *Ibid.*

4. A person having arrived at an age rendering him competent to testify as a witness in court, may give evidence respecting his own age, although his knowledge thereof be based wholly upon hearsay. *Ibid.*

5. A father gave a mortgage to his son-in-law and afterwards the father delivered to him a deed of the same premises and the son-in-law satisfied the mortgage. In an action by children, after the father's death, to set aside the mortgage and deed because obtained by fraud and undue influence, the plaintiffs examined the son-in-law, as an adverse party, under the authority of sec. 4068, Stats. 1898, as to the execution of the two instruments, and called out testimony, to the effect that the only consideration paid therefor was the support and care of the father for the last five or six years of his life, his doctor bills, funeral expenses and $15 in money. *Held,* that the plaintiffs thereby, under sec. 4069, opened the door for the admission of testimony of defendants as to the exact consideration for the instruments. *Drinkwine v. Gruelle,* 628

WORDS AND PHRASES.

Agent, in statute. See INSURANCE, 8.
Agent (for service of process), in statute. See INSURANCE, 4.
Cannot be made elsewhere. See SUPREME COURT, 12.
Conspicuous place. See TAX TITLES, 1, 2.
During such term, in franchise. See MUNICIPAL CORPORATIONS, 2.
Factors. See FACTORS, 1.
First ten years, in franchise. See MUNICIPAL CORPORATIONS, 2.
For peculiar and satisfactory reasons. See SUPREME COURT, 3.
For the first ten years, in franchise. See MUNICIPAL CORPORATIONS, 2.
Franchise period, in franchise. See MUNICIPAL CORPORATIONS, 2.
Insurance agent, in statute. See INSURANCE, 8.
Kept for sale, in statute. See TAXATION, 7.
Leasehold period, in franchise. See MUNICIPAL CORPORATIONS, 2.
Main channel of the Mississippi river. See BOUNDARIES, 2.

Merchants' goods, wares and commodities, in statute. See TAXATION, 7.
Mississippi River, in statute. See BOUNDARIES, 4, 5.
My lawful heirs, in will. See WILLS, 2.
Orphans' home. See FALSE PRETENSES, 3.
Party aggrieved, in statute. See APPEAL, 3.
Pistol, in statute. See NEGLIGENCE, 2, 3.
Public place, in statute. See TAX TITLE, 1.
Revolver, in statute. See NEGLIGENCE, 2, 3.
Risk or hazard peculiar to the operation of railroads, in statute. See RAILROADS, 8.
Tax assessed, in franchise. See MUNICIPAL CORPORATIONS,
Toy firearm, in statute. See NEGLIGENCE, 3.
Toy pistol, in statute. See NEGLIGENCE, 3.
Toy revolver, in statute. See NEGLIGENCE, 3.
Transacting business, in statute. See CORPORATIONS, 3.

WRITS.
Of *certiorari*. See HABEAS CORPUS, 4, 5. HIGHWAYS, 2.
Of *habeas corpus*. See HABEAS CORPUS.
Of replevin. See REPLEVIN.
Of error. See HABEAS CORPUS, 5.

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